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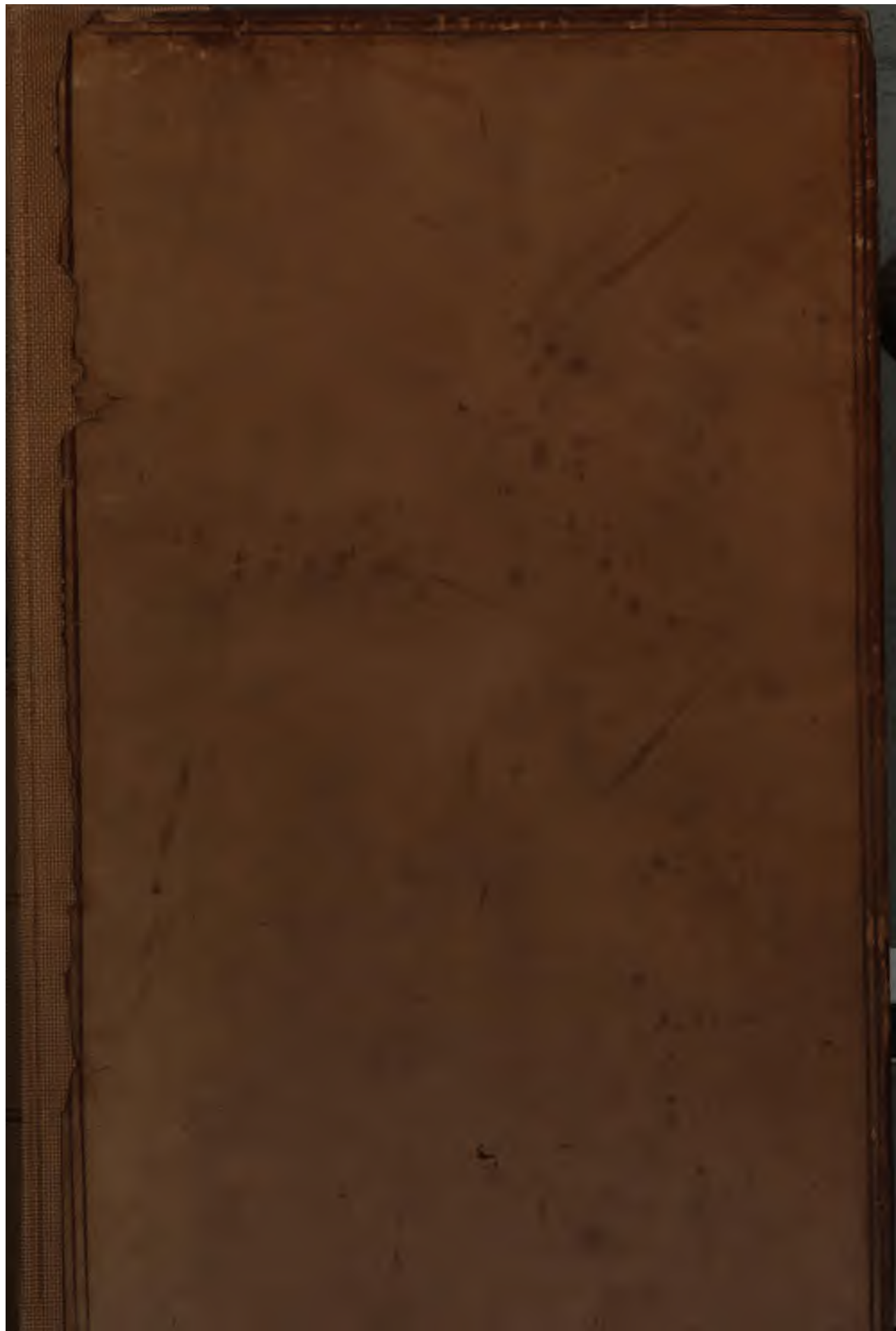
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COMMON BENCH REPORTS.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS

AND

Exchequer Chamber,

IN

TRINITY AND MICHAELMAS TERMS, 1854, AND HILARY
TERM AND VACATION, 1855.

BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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2

TABLE

OF

CASES REPORTED.

A.		PAGE	C.		PAGE
ALTIN, Charles <i>v.</i>	.	46	Cambers, Knight <i>v.</i>	.	562
Astbury, App., Henderson,			Campanari <i>v.</i> Woodburn	.	400
Resp.	.	251	Canham <i>v.</i> Barry	.	597
Ayre, Peterson <i>v.</i>	.	724	Cannell, Mays <i>v.</i>	.	107
B.			Capper, Gether <i>v.</i>	.	39, 696
Babonneau <i>v.</i> Farrell	.	360	Carrington, Chilton <i>v.</i>	95,	730
Bamberger <i>v.</i> The Commer-			Carter, Skinner <i>v.</i>	.	472
cial Credit Mutual Assur-			Charles <i>v.</i> Altin	.	46
ance Society	.	676	Child, Ex parte	.	238
Barber, Hernamann <i>v.</i>	.	774	Chilton <i>v.</i> Carrington	95,	730
Barry, Canham <i>v.</i>	.	597	Clericetti, In re	.	762
Bell <i>v.</i> Young	.	524	Commercial Credit Mutual		
Benge <i>v.</i> Swaine	.	784	Assurance Society, Bam-		
Betham, Jenkins <i>v.</i>	168,	189	berger <i>v.</i>	.	676
Bingle, In re	.	449	Cooper <i>v.</i> Parker	.	822
Birch, In re	.	743	Copper Miners' Company,		
Black <i>v.</i> Green	.	262	Wood <i>v.</i>	.	464
Bloor <i>v.</i> Huston	.	266	Cottrell <i>v.</i> Hughes	.	532
Borthwick, App., Walton,			Cumberland <i>v.</i> Bowes	.	348
Resp.	.	501	D.		
Bowes, Cumberland <i>v.</i>	.	348	Dalby <i>v.</i> The India and Lon-		
— <i>v.</i> Lord Ravensworth	512		don Life-Assurance Com-		
Bristol (Marquis) <i>v.</i> Robinson	244		pany	.	365
Buckland <i>v.</i> Johnson	.	145	Davies, Lloyd <i>v.</i>	.	76

1 A. 75. d. 302

L. L.
C. W. UK

100
C. 210

—

TABLE OF CASES REPORTED.

vii

	PAGE		PAGE
Knight <i>v.</i> Cambers . . .	562	Peel <i>v.</i> Thomas . . .	714
—— <i>v.</i> Fitch . . .	566	Peterson <i>v.</i> Ayre . . .	724
		Pritchard <i>v.</i> The London and	
L.		Birmingham Extension,	
La Roche, Talbot <i>v.</i> . . .	310	Northampton, Daventry,	
Laurie, Moffatt <i>v.</i> . . .	583	Leamington, and War-	
Legge, In re . . .	364	wick Railway Company .	331
Leverson <i>v.</i> Shaw . . .	282	Promotions:—	
Lewis, Resp., Huggett, App.	245	Collier, Robert Porrett .	261
Lloyd <i>v.</i> Davies . . .	76	Denison, Edmund Beckett	261
London and Birmingham Ex-		Erle, Peter . . .	261
tension, Northampton, Da-		Phinn, Thomas . . .	261
ventry, Leamington, and			
Warwick Railway Com-			
pany, Pritchard <i>v.</i> . .	331		
Lott, Haddan <i>v.</i> . . .	411		
M.		R.	
Marwood, Milne <i>v.</i> . . .	778	Ravensworth (Lord), Bowes <i>v.</i>	512
Mays <i>v.</i> Cannell . . .	107	Reed, Wilkin <i>v.</i> . . .	192
Memoranda, see Promotions.		Regulæ Generales . . .	478
Meux, Dorrett <i>v.</i> . . .	142	Richardson, South-Eastern	
Milne <i>v.</i> Marwood . . .	778	Railway Company, <i>v.</i> . .	810
Milnes and Robertson, In re	451	Rider, Gillow <i>v.</i> . . .	729
Moffatt <i>v.</i> Laurie . . .	583	Robertson and Milnes, In re	451
Morrell, Wilson <i>v.</i> . . .	720	Robinson, Bristol (Marquis) <i>v.</i>	244
N.		S.	
Northampton Gas - Light		Sadd, Simpson <i>v.</i> . . .	757
Company <i>v.</i> Parnell . .	630	Scott, Fischel <i>v.</i> . . .	69
		Service, Holmes <i>v.</i> . . .	293
O.		Shaw <i>v.</i> Hughes . . .	660
Ollerton, In re . . .	796	——, Leverson <i>v.</i> . . .	282
		Sim <i>v.</i> Edmands . . .	240
P.		Simpson <i>v.</i> Sadd . . .	757
Parker, Cooper <i>v.</i> . . .	822	Skinner <i>v.</i> Carter . . .	472
Parnell, Northampton Gas-		Smart <i>v.</i> Harding . . .	652
Light Company <i>v.</i> . .	630	Smith <i>v.</i> Eldridge . . .	236
		——, Farnell <i>v.</i> . . .	572
		—— <i>v.</i> Humble . . .	321
		——, Wegener <i>v.</i> . . .	285

TABLE OF CASES REPORTED.

	PAGE		PAGE
South-Eastern Railway Com- pany v. Richardson	810	Walton, Resp., Borthwick, App.	501
Stafford, Resp., Wollaston, App.	278	Warne, In re	767
Swaine, Bengé v.	784	Wegener v. Smith	285
Symes, Gittins v.	362	Weiss, In re	331
T.		Wilkin v. Reed	192
Talbot v. La Roche	310	Wilkinson v. Kirby	430
Tanqueray, Hopkins v.	130	Willis, Harris v.	710
Teetgen, Griffiths v.	344	Wilson v. Morrell	720
Thomas, Peel v.	714	Wollaston, App., Stafford, Resp.	278
Tierney, In re	761	Wood v. The Copper-Miners' Company	464
V.		Woodburn, Campanari v.	400
Vann, In re	341	Y.	
		Young, Bell v.	524

TABLE

OF

CASES CITED.

	PAGE
ACKWOOD v. Read, 7 Dowl. P. C. 810	662
Adams v. Broughton, Andrews, 18, 2 Stra. 1078	157, 163
—— v. Claxton, 6 Ves. 229	103 (b)
—— v. Wordley, 1 M. & W. 374	606
Adley v. Reeve, 2 M. & Selw. 53	25
Admiralty Case, 13 Co. Rep. 51	712
Agricultural Cattle Insurance Company, In re, Ex parte Spackman, 1 De G. & S. 599	334
Aitcheson v. Cargey, 13 Price, 639, 9 J. B. Moore, 381, 2 Bingh. 199, M'Clell. 367	127 (a)
Allen v. Cameron, 1 C. & M. 832	54, 55
——, App., House, Resp., 8 Scott, N. R. 987, 7 M. & G. 157, 1 Lutw. Reg. Cas. 255.	247
Andrew v. Hancock, 3 J. B. Moore, 278, 1 Brod. & B. 37	327
Andrews, Ex parte, In re Emett, 1 Madd. 573, 2 Rose, 410	378, 382, 383, 384
Anonymous, 24 Law Journ., N. S., Q. B. 23.	266 (a)
——, F. Moore, fo. 23, pl. 80	60
——, 2 Salk. 522	733
——, 2 Taunt. 61	291
——, 2 Vern. 177	103 (b)
——, 2 Ves. 662	103 (a)
——, Woodfall's L. & T. p. 815	481, 483, 486
Apperton, In re, 1 C. B. 447	364
Appleton v. Campbell, 2 C. & P. 347	211
Argentton v. Westover, Cro. Eliz. 275	804
Armstrong v. Norton, 2 Irish Law Rep. 96	439, 441
Ashby v. White, 2 Ld. Raym. 938, 1 Salk. 19, 3 Salk. 17, Holt, 524, 6 Mod. 45, 1 Smith, L. C. 105	429
Ashley v. Ashley, 3 Simons, 149	379
—— v. Harrison, 1 Esp. N. P. C. 194	421

TABLE OF CASES CITED.

	PAGE
Aspinall v. Kempson, Sugden's V. & P., 11th edit. 1148	555, 558
Astley v. Younge, 2 Burr. 807	420
Astlin v. Parkin, 2 Burr. 665, Barnes, 472	437, 439, 443
Augarde v. Thompson, 2 M. & W. 617.	791
Avery v. Scott, 8 Exch. 487, 22 Law Journ., N. S., Exch. 287, 290	651
Bagge, App., Mawby, Resp., 8 Exch. 641	279
Bancks v. Ollerton, 10 Exch. 168	801
Barber, Ex parte, In re The London and Manchester Direct Independent Rail- way Company, 13 Jurist, 82	334
———, 1 M'N. & G. 176, 1 H. & Tw. 238	334
Barber v. Morris, 1 M. & Rob. 62	378, 382, 392
Barley v. Walford, 9 Q. B. 197	423
Barnes v. Marshall, 21 Law Journ., N. S., Q. B. 388	506
Barnfactor v. Lee, MS., E. 26 G. 3, B. R.	327
Bartholomew v. Sherwood, cited 1 T. R. 573	529
Bartlett v. Purnell, 4 Ad. & E. 792, 6 N. & M. 299	135, 138
Barton, App., Ashley, Resp., 2 C. B. 4, 1 Lutw. Reg. Cas. 307	249
Beamish, App., Stoke (Overseers of), Resp., 11 C. B. 37, 2 Lutw. Reg. Cas. 189	254
Beckham v. Drake, 9 M. & W. 92	613
Bell v. Banks, 3 M. & G. 267, 3 Scott, N. B. 497	153
Belshaw v. Bush, 11 C. B. 191	92(a)
Bensley v. Bignold, 5 B. & Ald. 335	218(a)
Bettleley v. Buck, 13 Jurist, 368	504
Biddell v. Dowse, 6 B. & C. 255, 9 D. & R. 404	405(a)
Biggs v. Lawrence, 3 T. R. 454	217
Birch and Bell, In re, 6 Scott, 185, 4 N. C. 394	765
Bird v. Gammon, 3 N. C. 883, 5 Scott, 213	305
Blades v. Free, 9 B. & C. 167, 4 M. & R. 282	403
Blake v. Cooper, 11 C. B. 680	294(b)
Blamire v. Haley, 6 M. & W. 55	346
Blundell v. Catterall, 5 B. & Ald. 268	747, 752, 754
Bosworth v. Bryden, 7 Mod. 459, 2 Stra. 1112	26(a)
——— v. Hearne, 2 Stra. 1085	33
Bowry v. Bennett, 1 Campb. 348	218
Boyd v. Siffken, 2 Campb. 326	75
Brace v. Marlborough (Duchess of), 2 P. Wms. 491	103(a)
Brazier v. Bryant, 3 M. & Scott, 844, 2 Dowl. P. C. 757	235(a)
British Commercial Insurance Company v. Magee, 1 Cooke & Alcock, 182	374, 380, 388
Broking v. Cham, Cro. Jac. 425	135
Brouncker v. Scott, 4 Taunt. 1	286
Brown v. Crump, 1 Marsh. 567, 6 Taunt. 300	306
——— v. Duncan, 10 B. & C. 93, 5 M. & R. 114	218(a)
——— v. Mallett, 5 C. B. 499	61
——— v. Wootton, Cro. Jac. 73, Yelv. 67, F. Moore, 762	151, 154, 156, 164
Buckley v. Hann, 5 Exch. 43	504, 511
Bulwer's Case, 7 Co. Rep. 1	428
Burge, Ex parte, In re Herne Bay Pier Company, 1 De G. & S. 588	334

TABLE OF CASES CITED.

xi

	PAGE
Burmester v. Hilch, 13 East, 551	663(a)
Buttemere v. Hayes, 5 M. & W. 456	655, 657
Caffray v. Derby, 6 Ves. 488, 495	57
Campbell v. Smart, 5 C. B. 196	266
Cannan v. Bryce, 3 B. & Ald. 179	212
Cargey v. Aitchison, 2 B. & C. 170, 3 D. & R. 433	127
Carr v. Smith, 1 Dav. & Mer. 192	645
— v. Stephens, 9 B. & C. 758, 4 M. & R. 590	52, 53
Carter v. Dean, 1 Swanst. 64	528
— v. Fossett, Palmer, 329	589
Casberd v. Attorney General, 6 Price, 411	737
Cave v. Coleman, 3 M. & R. 2	132, 137
Chapman v. Morton, 11 M. & W. 534	673
— v. Pickersgill, 2 Wils. 245	427
Charnock and Woraley's Case, 1 Leon. 114	806
Child, In re, 15 C. B. 238	294(a)
Cholmondeley v. Clinton, 4 Bligh, 1, 87	553
Clark v. Gilbert, 2 N. C. 343, 2 Scott, 520	738
Clipperton, In re, 12 Q. B. 687	232
Clugas v. Penaluna, 4 T. R. 467	217
Cockburn v. Alexander, 6 C. B. 791	702, 704, 706
Cocking v. Ward, 1 C. B. 858	654, 655, 657, 658, 659
Cockson v. Ogle, 1 Lutw. 550	180
Coggs v. Bernard, 1 Ld. Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt, 13	732
Colburn v. Patmore, 1 C. M. & R. 73	216
Collins v. Forbes, 3 T. R. 316	486(a)
Colvill, App., Wood, Resp., 2 C. B. 210, 216, 1 Lutw. Reg. Cas. 483, 489	257
Connop v. Levy, 11 Q. B. 769	53
Coogan, App., Luckett, Resp., 2 C. B. 182, 1 Lutw. Reg. Cas. 447	254
Cooper v. Parker, 14 C. B. 118	824
— v. Shepherd, 3 C. B. 266	156, 157, 162
Copeland v. Lewis, 2 Stark. N. P. C. 33	508
Copeman v. Gallant, 1 P. Wms. 314	484, 488
Corner v. Shew, 3 M. & W. 350	404, 406
Cornfoot v. Fowke, 6 M. & W. 358	209, 611
Corrigall v. London and Blackwall Railway Co., 5 M. & G. 219, 6 Scott, N. R. 241	819
Cortelyou v. Lansing, 1 Cain. Cas. Err. (American) 200, 203	735(a)
Cousins v. Nantes, 3 Taunt. 513	374, 387
— v. Paddon, 2 C. M. & R. 547	440, 445
Crawford, In re, 4 C. B. 626	411(a)
Crump, In re, Ex parte Dering, 1 De Gex's B. C. 398	528, 530, 531
Cumber v. Wane, 1 Stra. 426, 1 Smith's L. C. 146	825
Cumberland v. Bowes, 15 C. B. 348	641
Dakin v. Brown, 8 C. B. 92	185(a)
Daly, In re, 5 C. B. 128	410
D'Aranda v. Houston, 6 C. & P. 511	221

	PAGE
Darling, In re, 2 C. B. 357	411(a)
Darrington v. Price, 6 C. B. 309	200(a), 731
Davidson v. Cooper, 11 M. & W. 778, 13 M. & W. 343	692
Davies, Dem., Lowndes, Ten., 7 Scott, N. R. 215	265
— 7 M. & G. 762, 8 Scott, N. R. 539	265
Dawson v. Collis, 10 C. B. 523	54(a)
Dean v. Peel, 5 East, 45	346
De Begnis v. Arnistead, 10 Bingh. 110, 3 M. & Scott, 511	218(b)
Decosta v. Atkins, Bull. N. P. 87	437, 438
Demandray v. Metcalf, Pre. Ch. 419, 420, 2 Vern. 691, 698, 1 Eq. Abr. 324, pl. 4, Gilb. Eq. Rep. 104	103(b), 735(a), 735(b)
Dering, Ex parte, In re Crump, 1 De Gex's B. C. 398	528, 530, 531
De Tastett v. Crousillatt, 2 Wash. C. C. R. 132	59
Dickenson v. Allsop, 13 M. & W. 722	457
Dickson v. Zizinia, 10 C. B. 602	701
Dimes v. The Grand Junction Canal Company, 3 House of Lords Cases, 759	803(a)
Doe d. Blackwell v. Plowman, 2 B. & Ad. 573	547, 556
— d. Bowman v. Lewis, 13 M. & W. 241	123
— d. Burdett v. Wrighte, 2 B. & Ald. 710	556
— d. Cadwalader v. Price 16 M. & W. 603	548, 552, 553, 555, 560
— d. Hall v. Mouldsdales, 16 M. & W. 689	550, 552
— v. Huddart, 2 C. M. & R. 316	436, 439, 442
— d. Madkins v. Horner, 8 Ad. & E. 235, 3 N. & P. 344	121, 125, 127, 128
— d. Poole v. Errington, 1 Ad. & E. 750, 3 N. & M. 646, 1 M. & Rob. 343	197, 199
— d. Putland v. Hilder, 2 B. & Ald. 782	532, 546, 555, 556, 558, 559
— d. Starling v. Hillen, 2 Dowl. N. S. 694	123, 125, 127, 128
— d. Tatum v. Catamore, 16 Q. B. 745	450
— v. Wellsman, 2 Exch. 369	436, 440, 442, 447
— v. Wright, 10 Ad. & E. 763, 2 P. & D. 672	436, 440, 442, 443, 447, 449
Dore v. Gray, 2 T. R. 365	484
Down v. Hatcher, 10 Ad. & E. 121, 2 P. & D. 292	825, 827, 828
Dowse v. Cox, 3 Bingh. 20, 10 J. B. Moore, 272	405
Dunsany (Baroness), In re, 7 C. B. 119	411(a)
Durham and Sunderland Railway Company v. Walker, 2 Q. B. 968	519
Dutton v. Solomonson, 3 B. & P. 582	509
Eddlestone v. Collins, 3 De Gex, M.N. & G. 1	804
Edwards v. Brown, 1 C. & J. 307	222
Eidsforth, App., Farrer, Resp., 4 C. B. 9, 1 Lutw. Reg. Cas. 517	250
Emanuel v. Dane, 3 Camp. 299	220
Emery, In re, 10 C. B. 160	462(a)
— v. Bartlett, 2 Ld. Raym. 1555, 2 Stra. 827	510
— v. Grocock, Sugden's V. & P., 11th edit. 1148	556
Emett, In re, Ex parte Andrews, 1 Madd. 573	378
Evans v. Edmonds, 13 C. B. 777	213, 612
— v. Elsam	94
— v. Powis, 1 Exch. 601, 608	631
Ewing v. Osbaldiston, 2 Mylne & Cr. 86	218(b)

TABLE OF CASES CITED.

xiii

	PAGE
Fagan, <i>In re</i> , 5 C. B. 436	762(a)
Feddon, App., Sawyers, Resp., 12 C. B. 680, 2 Lutw. Reg. Cas. 246	247
Feret v. Hill, 15 C. B. 207	606, 611, 615, 616, 617
Ferrer's Case, 6 Co. Rep. 7. a.	159
Filmer v. Delber, 8 Taunt. 486	721
Fisher v. Pyne, 1 Man. & G. 265	662
Fishmongers' Company v. Robertson, 5 M. & G. 176	135
Fitch v. Sutton, 5 East, 230	825
Fitzgerald v. Graves, 5 Taunt. 342	235(a)
Fivaz v. Nicholls, 2 C. B. 501	215
Flockton v. Hall, 14 Q. B. 380	625, 628
Flynn, <i>Ex parte</i> , 1 Atk. 185	488(a)
Forster v. Wilson, 12 M. & W. 191	406
Foster v. Charles, 4 M. & P. 61, 741, 6 Bingh. 396, 7 Bingh. 105	196
—— v. Jolly, 1 C. M. & R. 703, 5 Tyrwh. 239	606
—— v. Mapes, Cro. Eliz. 212	640
Fox v. Clifton, 4 M. & P. 676, 6 Bingh. 776, 2 M. & Scott, 146, 9 Bingh. 115	718
Franklin v. Neate, 18 M. & W. 481	733
Frogmorton d. Fleming v. Scott, 2 East, 467	214
Fuller, Re, 2 Ellis & B. 573	506, 511
Garland v. <i>Extend</i> , 1 Salk. 194, 2 Ld. Raym. 992	790
Gas-Light and Coke Company v. Turner, 7 Scott, 779, 5 N. C. 666 . 211, 219, 224, 225 6 N. C. 324, 8 Scott, 609 . 212, 219, 224, 225	
Gausson v. Morton, 10 B. & C. 731	402
Geddes v. Pennington, 5 Dow, 159	609, 612, 615
Gee v. Wilden, 2 Lutw. 1820	26(a)
Gerard v. Dickenson, 4 Co. Rep. 18. a.	423
Ghialin v. Deen, 18 Jurist, 82	507
Gibbon v. Copeman, 5 Taunt. 840, 1 Marsh. 392	663(a)
Gillett v. Mawman, 1 Taunt. 137	61
Godsall v. Boldero, 9 East, 72 365, 374, 376, 378, 379, 380, 381, 382, 383, 384, 391, 392, 393, 397, n.	
Goreham v. Sweeting, 2 Saund. 200	374
Goaling v. Veley, 7 Q. B. 406	25
Granger v. Collins, 6 M. & W. 458	306
Greaves v. Ashlin, 3 Campb. 426	669, 673
Green v. Button, 2 C. M. & R. 707	423
Griffin v. Blandford, Cowp. 62	29
Grizewood v. Blane, 11 C. B. 526, 538	570, 571
Grugeon v. Gerrard, 4 Y. & C. (Exch.) 119	737
Gunmakers' Company v. Fell, Willes, 384	33
Gutsole v. Mather, 1 M. & W. 495	420, 422
Hall v. Flockton, 16 Q. B. 1089	627
Hamilton, App., Bass, Resp., 12 C. B. 631, 2 Lutw. Reg. Cas. 213	254
—— v. Mendes, 2 Burr. 1210	377, 378, 383, 391

	PAGE
Hammond, <i>Ex parte</i> , 1 De Gex's B. C. 93	531
Harris v. Parker, 3 Dowl. P. C. 451	358
Harrison v. Creswick, 13 C. B. 399, 417	127
Hart v. Windsor, 12 M. & W. 68, 88	219
Hartley v. Bateson, 1 T. R. 629	663(a)
Hartahorne v. Watson, 4 N. C. 178, 5 Scott, 506, 6 Dowl. P. C. 404	688
Harwood v. Lester, 3 B. & P. 617	509
Hawes v. Humble, 2 Campb. 327 n.	75
Hawken v. Bourne, 8 M. & W. 703	718, 719
Hayward v. Scougall, 2 Campb. 56	72, 75
Hemsworth v. Brian, 1 C. B. 131	457
Henson v. Blackwell, 4 Hare, 434	378, 384, 393
Hernaman v. Smith, 10 Exch. 659	511(a)
Hernemann v. Barber, 14 C. B. 583	774(a)
Herne Bay Pier Company, <i>In re</i> , <i>Ex parte</i> Burge, 1 De G. & S. 588	334
Hitchin v. Campbell, 3 Wils. 240, 2 Sir W. Blac. 779	159, 161
Hitchins v. The Kilkeny and Great Southern and Western Railway Company, <i>In re</i> Emery, 10 C. B. 160	462(a)
Hobson v. Stewart, 1 B. C. Rep. 288	126
Hocking v. Matthew, 1 Vent'r. 86, 1 Sid. 463	428
Hodgson v. Temple, 5 Taunt. 181	218
Holman, <i>Ex parte</i> , Sugden's V & P. 11th edit. 1148	556
v. Johnson, Cowp. 341, 343	214, 217
Hopkins v. Logan, 5 M. & W. 241, 7 Dowl. P. C. 360	306
Horton v. Kilmore, <i>Cas. temp. Hardwicke</i> , 6	489
Houlditch v. Swinfen, 2 N. C. 712, 3 Scott, 169, 5 Dowl. P. C. 36	472
Hughes v. Lumley, 19 Jurist, 60	190
Humphrey v. Arabin, 2 Lloyd & G. (<i>Cas. temp. Plunket</i>)	382, 384, 393
Hungate's Case, 12 Co. Rep. 122, 1 Roll. Rep. 113	804
Hunt v. Bate, Dyer, 272	307
Huntley v. Russell, 13 Q. B. 572	185
Hutchins v. Chambers, 1 Burr. 579	279
Huth v. Long, 19 Law Journ., N. S., Q. B. 325	505
Hutton v. Warren, 1 M. & W. 466	672
Huxham v. Smith, 2 Campb. 21	509
Hyde v. Hill, 3 T. R. 377	327, 329
 Issack v. Clark, 2 Bulstr. 306	 733
 Jackson v. Cobbin, 8 M. & W. 790, 1 Dowl. N. S. 96	 306
James v. Raggett, 2 B. & Ald. 776, 1 Chitt. Rep. 471	662
— v. Tutney, Cro. Car. 497	34
Jarman v. Woollaton, 3 T. R. 618	488(a)
Jarvis v. Rogers, 15 Mass. R. 389	103(b)
Jebb v. McKiernan, M. & M. 340	644, 646
Jefferies v. Dyson, 2 Stra. 960	437
Jeffery v. White, 2 Dougl. 476	241

TABLE OF CASES CITED.

xv

	PAGE
<i>Jenkins v. Betham</i> , 15 C. B. 168	641
<i>Johnson v. Hudson</i> , 11 East, 180	218(a)
— <i>v. Macdonald</i> , 9 M. & W. 600	73
<i>Jones v. Broadhurst</i> , 9 C. B. 173	92
— <i>v. Chapman</i> , 2 Exch. 803	441, 443
— <i>v. Gwynn</i> , 10 Mod. 214	428
— <i>v. Powles</i> , 3 Mylne & Keene, 581	554
— <i>v. Smith</i> , 2 Ves. jun. 372, 376, 378	103(a), 103(b), 735(b)
<i>Kaye v. Dutton</i> , 7 M. & G. 807, 8 Scott, N. R. 495	306
<i>Keighley, Ex parte</i> , 9 C. B. 338, 1 L. M. & P. 304	282
<i>Kelly v. Partington</i> , 5 B. & Ad. 645	421
—, App., <i>Webster, Resp.</i> , 12 C. B. 283	654, 658
<i>Kemp v. Westbrook</i> , 1 Ves. sen. 278	733, 735(a), 735(b)
<i>Kilburn v. Kilburn</i> , 13 M. & W. 671	126
<i>King v. Hoare</i> , 13 M. & W. 494	153, 156, 158, 163
<i>Kingdon v. Nottle</i> , 1 M. & Selw. 355	589
<i>Kingston (Duchess's) Case</i> , 2 Smith's Leading Cases, 424—460	713
<i>Kitchen v. Campbell</i> , 3 Wils. 240, 304, 2 W. Bl. 779, 827	152, 713
<i>Knight v. Cambers</i> , 15 C. B. 562	569
<i>Knott, Ex parte</i> , 11 Ves. 617	103(a)
<i>Lacon v. Barnard</i> , Cro. Car. 35	158
<i>Lamprell v. Billericay Union</i> , 3 Exch. 283	643
<i>Langton v. Hughes</i> , 1 M. & Selw. 593	212, 218
<i>Lanphier v. Phipps</i> , 8 C. & P. 475	186(a)
<i>Last v. Benton</i> , 2 Marsh. 478	663(a)
<i>Law v. Blackburn</i> , 14 C. B. 77	125, 127, 128
— <i>v. The Indisputable Life Policy Company</i> , 1 Jurist, N. S. 178, 24 Law Journ., N. S. Chan. 196	397, n.
<i>Leathley v. Webster, Sayer</i> , 251	26(a)
<i>Lechmere v. Fletcher</i> , 1 C. & M. 634	153, 165(a), 304
<i>Leeds v. Burrows</i> , 12 East, 1	645
<i>Lewis v. Clifton</i> (not reported)	197, 482
<i>Lightfoot v. Tenant</i> , 1 Bos. & Pull. 551	212
<i>Litchfield v. Ready</i> , 5 Exch. 939	439, 441
<i>Little v. Newton</i> , 2 M. & G. 351, 360, 2 Scott, N. R. 509, 517, 9 Dowl. P. C. 437	725
<i>London and Manchester Direct Independent Railway Company, In re, Ex parte</i> <i>Barber</i> , 13 Jurist, 82	334
—, 1 M.N. & G. 176, 1 H. & Tw. 238	334
<i>Lovatt v. Hamilton</i> , 5 Exch. 639	73
<i>Loveridge v. Hodgson</i> , 2 B. & Ad. 602	754
<i>Lovett v. Weller</i> , 1 Roll. Rep. 309	423
<i>Lowthian v. Hasel</i> , 3 Bro. C. C. 162	103(a)
<i>Lucena v. Crawford</i> , 2 B. & P. 324, 2 N. R. 269	387
<i>Lysney v. Selby</i> , 2 Ld. Raym. 1118	184
<i>Macarthur v. Campbell</i> , 5 B. & Ad. 518, 2 N. & M. 444	235(a)

	PAGE
M'Kellar v. Reddie, 5 Scott, N. R. 192	265
M'Kenzie v. The Sligo and Shannon Railway Company, 24 Law Journ., N. S., Q. B. 17	335
Mace v. Cadell, Cowp. 232	488(a)
Mallough v. Barber, 4 Campb. 150	58
Mansfield's Case, 12 Co. Rep. 123. b.	804, 805
Marsh v. Wood, 9 B. & C. 659, 4 M. & R. 504	456, 458
Marson v. Lund, 16 Q. B. 344	463
Mason v. Ditchbourne, 1 M. & Rob. 460, 2 C. M. & R. 720 (a)	220, 221, 606, 610, 611
Mathews v. Cartwright, 2 Atk. 347	103(a)
Matthew v. Osborne, 13 C. B. 919	436
Meres v. Ansell, 3 Wils. 275	670
Meyer v. Everth, 4 Campb. 22	670
Miller v. Robe, 3 Taunt. 461	235(a)
Milnes and Robertson, In re, 15 C. B. 451	722
Mitchell v. Cragg, 10 M. & W. 367	825
—— v. Reynolds, 1 P. Wms. 181	33
Moffatt v. Dickson, 13 C. B. 543	590, 593
Moon v. Witney Union (Guardians of), 5 Scott, 1, 3 N. C. 814	590, 592
Moore v. Foster, Yelv. 62	179
Morgan v. Evans, 7 J. B. Moore, 344	291
—— v. Pike, 14 C. B. 473	640, 647
Morris v. Summerl, 2 Wash. C. C. R. 203	59
Morse v. Slue, 1 Ventr. 190, 238, Sir T. Raym. 220, 1 Mod. 85, 2 Keble, 806, 3 Keble, 72, 112, 135, 2 Lev. 69	713
Musselbrook v. Dunkin, 2 M. & Scott, 740, 9 Bingh. 605, 1 Dowl. P. C. 722	235(a)
 Newman v. Zachary, Aleyn, 3	426
Noble v. Chapman, 14 C. B. 400	290
Nokes, plt., Styles, def., 3 Taunt. 49	806
 Oakley v. Rigby, 3 Scott, 194, 2 N. C. 732	570(a)
 Palmer v. Earith, 14 M. & W. 428	330
—— v. Pope, Hob. 79	713
Park v. Hamond, 4 Campb. 344	58
Parker v. Ade, 1 Dowl. P. C. 643	197(a)
—— v. Rolls, 14 C. B. 691	185(b)
Parks v. Edge, 1 C. & M. 429, 3 Tyrwh. 364	197(a), 199
Parry v. Fairhurst, 2 C. M. & R. 190, 5 Tyrwh. 685	197(a)
Pasley v. Freeman, 3 T. R. 51, 59	134
Patman v. Vaughan, 1 T. R. 573	529
Percival v. Cooke, 2 C. & P. 460	184
Perkins v. Adcock, 14 M. & W. 808, 3 D. & L. 270	291, 292
—— v. Washington Insurance Company, 4 Cowen, 645, 664	58
Perry v. Mitchell, 1 Webster, P. C. 269	319
Peterson v. Ayre, 13 C. B. 353	724
——, 14 C. B. 665	725

TABLE OF CASES CITED.

xvii

	PAGE
<i>Peytoe's Case</i> , 9 Co. Rep. 79. a	629
<i>Phillips v. Claggett</i> , 11 M. & W. 84, 91	738
— <i>v. Eastwood</i> , 1 Lloyd & G. (Cas. temp. Sugden) 270, 290	382, 384, 393
<i>Pilton</i> , Ex parte, 1 B. & Ald. 369	481, 483, 486, 489
<i>Pitchford v. Davis</i> , 5 M. & W. 2	718
<i>Plunkett v. Buchanan</i> , 3 B. & C. 736, 5 D. & R. 625	472
<i>Pocklington v. Peck</i> , 1 Stra. 638	791
<i>Poensgen v. Chanter</i> , 6 Scott, 300	776, 777
<i>Polhill v. Walter</i> , 3 B. & Ad. 114	780
<i>Pope v. Lewyns</i> , Cro. Jac. 630	135(a)
<i>Pordage v. Cole</i> , 1 Wms. Saund. 320 b.	643
<i>Powell v. Divett</i> , 15 East, 29	692
— <i>v. Graham</i> , 7 Taunt. 580, 1 J. B. Moore, 305	406
<i>Power v. Barham</i> , 4 Ad. & E. 473, 6 N. & M. 62, 7 C. & P. 356, 1 M. & Rob. 507	136
<i>Price v. Morgan</i> , 1 P. & D. 376, 9 Ad. & E. 505	791
— <i>v. Popkin</i> , 10 Ad. & E. 139, 2 P. & D. 304	121
<i>Pullen v. Seaven</i> , 2 Gale, 132	197(a)
<i>Put v. Rawsterne</i> , Sir T. Raym. 472	153
 <i>Quick v. Ludborrow</i> , 3 Bulstr. 30	 406
 <i>Railstone v. York, Newcastle, and Berwick Railway Co.</i> , 15 Q. B. 404	 817, 821
<i>Raper v. Birkbeck</i> , 15 East, 17	693
<i>Regina v. Abney</i> , 3 Ellis & B. 779	579, 581
— <i>v. Lancaster and Preston Junction Railway</i> , 6 Q. B. 759	817
— <i>v. London, Brighton, and South Coast Railway Company</i> , 15 Q. B. 813	256
— <i>v. Westbrook</i> , 10 Q. B. 178	256
<i>Rex v. Almon</i> , Wilmot's Notes, 264	200(a), 731
— <i>v. Attwood</i> , 6 B. & C. 277, 9 D. & R. 328	256
— <i>v. Cohen</i> , 1 Stark. N. P. C. 511	790
— <i>v. Loxdale</i> , 1 Burr. 445, 448	495
— <i>v. Mast</i> , 6 T. R. 154	255
— <i>v. Parrott</i> , 5 T. R. 593	256(a)
— <i>v. Spencer</i> , 3 Burr. 1837	33
— <i>v. Tappenden</i> , 3 East, 186	27
<i>Ridgway v. Cannon</i> , 23 Law Times, 143	294
<i>Ritchie v. Smith</i> , 6 C. B. 463	210, 224, 225
<i>Roberts v. Lambert</i> , 2 Taunt. 293	663(a)
— <i>v. Savill</i> , 5 Mod. 407, 1 Salk. 13, 3 Salk. 16, Carth. 416, 1 Ld. Raym. 374, 12 Mod. 210	428
<i>Robertson v. Money</i> , R. & M. 75	706
<i>Robins v. Robins</i> , 12 Mod. 278	428
<i>Robinson v. Bristol (Marquis)</i> , 11 C. B. 208, 241	244
— <i>v. Burbidge</i> , 9 C. B. 289	731(a)
<i>Rogers v. Dejoncourt</i> , 7 Irish Law Rep. 482	406
<i>Rolph's Case</i> , 2 Peckw. 104	257

	PAGE
<i>Roscorla v. Thomas</i> , 3 Q. B. 234, 2 Gale & D. 508	306
<i>Ryall v. Rowles</i> , 1 Atk. 175, 182, 1 Vcs. 365, 371	488
<i>Sadlers' Company v. Badcock</i> , 2 Atk. 554	380
<i>St. John v. Holford</i> , 1 Ch. Cas. 97	103 (a)
<i>Salkard v. Beckwith</i> , 1 Lutw. 116	182
<i>Sanders v. Vanzeller</i> , 4 Q. B. 260, 3 Gale & D. 580	287, 290
<i>Sawbridge v. Coxwell</i> , 4 Taunt. 255	663 (a)
<i>Scholesfield, In re</i> , 3 Scott, 657, 3 N. C. 293	802
<i>Schwieger v. Magee</i> , 1 Cooke & Alcock, 182	374, 380, 388
<i>Scott v. Avery</i> , 8 Exch. 487	646
— <i>v. Dixon</i> , 2 Wils. 3	440
<i>Seare v. Prentice</i> , 8 East, 348	186 (a)
<i>Shepherd v. Lewis</i> , 2 Sir T. Jones, 6	630
— <i>v. Titley</i> , 2 Atk. 352	103 (a)
<i>Sheppard v. Wakeman</i> , 1 Lev. 53, 1 Sid. 79	422, 423
<i>Shuttleworth, In re</i> , 9 Q. B. 651	238
<i>Sibree v. Tripp</i> , 15 M. & W. 23	825
<i>Simpson v. Bloss</i> , 7 Taunt. 246, 2 Marsh, 542	216
— <i>v. Swan</i> , 3 Campb. 291	56, 61
<i>Slatterie v. Pooley</i> , 6 M. & W. 664	144
<i>Smart v. Hyde</i> , 8 M. & W. 723	606
— <i>v. Sanders</i> , 3 C. B. 380, 5 C. B. 895	402, 403
<i>Smartle v. Williams</i> , 1 Salk. 245, 3 Lev. 387, Hob. 478, Comb. 247	439
<i>Smith v. Mawhood</i> , 14 M. & W. 452	211
— <i>v. Bolt</i> , 9 C. & P. 696	507
<i>Smout v. Ilbery</i> , 10 M. & W. 1	403, 406, 407
<i>Snow v. Townsend</i> , 6 Taunt. 123, 1 Marsh. 477	291
<i>Solomon v. Lawson</i> , 8 Q. B. 823	420
— <i>v. Ward</i> , 2 C. & P. 211	133
<i>Southern v. How</i> , Cro. Jac. 468	135 (a)
<i>Spackman, Ex parte, In re The Agricultural Cattle Insurance Company</i> , 1 De G. & S. 599	334
<i>Speight v. Oliveira</i> , 2 Stark. N. P. C. 693	347
<i>Splidt v. Heath</i> , 2 Campb. 57, n.	72 (a), 73
<i>Stalworth v. Inns</i> , 13 M. & W. 466, 469, 2 D. & L. 428	725
<i>Stonehewer v. Farrar</i> , 6 Q. B. 730	117, 120, 125, 127
<i>Story v. Richardson</i> , 6 N. C. 123, 8 Scott, 291	186
<i>Stuart v. Wilkins</i> , Dougl. 18	134
<i>Syers v. Jonas</i> , 2 Exch. 111	135, 672, 673, 674
<i>Tanner v. Smart</i> , 6 B. & C. 603, 9 D. & R. 549	305
<i>Taplin v. Florence</i> , 10 C. B. 744	403
<i>Taylor v. Shuttleworth</i> , 6 N. C. 277, 8 Scott, 565	457
<i>Thomas v. Cooke</i> , 2 B. & Ald. 119, 2 Stark. N. P. C. 408	655
<i>Thorp v. Fry</i> , Bull. N. P. 87	439
<i>Thursoden v. Warthen's Executors</i> , 2 Bulstr. 158	587
<i>Toby, In re</i> , 12 Q. B. 694, 1 L. M. & P. 426	283

TABLE OF CASES CITED.

xix

	PAGE
Tuck v. Tuck, 5 M. & W. 109	440, 445
Turner v. Davies, 1 Wms. Saund. 148, 150	52, 56
Uhde v. Walters, 3 Campb. 16	705
Vanderzee v. Willis, 3 Bro. C. C. 21	103 (b), 735 (a)
Vandyck v. Hewitt, 1 East, 98	217
Vane v. Mechell, Barnes, 284	663 (a)
Varasour v. Ormerod, 6 B. & C. 430, 9 D. & R. 597	29
Velthasen v. Ormsley, 3 T. R. 315	713
Vicars v. Wilcocks, 8 East, 1, 2 Smith's L. C. 302—305	427
Vintners' Company v. Passey, 1 Burr. 235	34
Vynior's Case, 8 Co. Rep. 82. a.	402
Wade v. Dowling, 4 Ellis & B. 44	725
Walker v. Burnell, Dougl. 317	488 (a)
Walmaley v. Cooper, 11 Ad. & E. 216, 3 P. & D. 149	55, 56
Walsh, In re, 1 Ellis & B. 383	505, 506
—— v. Whitcombe, 2 Esp. N. P. C. 565	402
Walters v. Smith, 2 B. & Ad. 892	153
Warburton v. Loveland d. Ivie, 1 Hudson & Brooke, 648	484, 706 (a)
Warcombe and Carrel's Case, 12 Co. Rep. 124. b.	804
Ward v. Const, 10 B. & C. 639, 5 M. & R. 409	329
Warren v. Peabody, 8 C. B. 800	45, 703, 706
Waters v. Thanet (Earl), 2 Q. B. 757, 2 Gale & D. 166	305
Watson v. Home, 7 B. & C. 285, 1 M. & R. 191	328, 329, 330
—— v. King, 4 Campb. 272	402
Waymell v. Reed, 5 T. R. 599	217
Webb v. Spicer, 13 Q. B. 886	607
Wells v. Parker, 1 T. R. 34	528
—— v. Porter, 3 Scott, 141, 2 N. C. 722	570 (a)
Wetherell v. Jones, 3 B. & Ad. 225	218
Whitfield v. Brandwood, 2 Stark. N. P. C. 440	328, 329
Whitwell v. Scheer, 8 Ad. & E. 301, 3 N. & P. 398	197 (a)
Whitworth v. Gangain, 1 Phill. Ch. Cas. 728	736
Wilcox v. Wilcox, 4 Exch. 500	126
Wilde v. Sheridan, 21 Law Journ., N. S., Q. B. 260	504
Wilkinson v. Johnson, 3 B. & C. 428, 5 D. & R. 403	693
Williams v. Archer, 5 C. B. 318	732
—— v. Burrell, 1 C. B. 402	405
—— v. Littlefield, 2 Wend. 362	58
Williamson v. Allison, 2 East, 446	132
Winch v. Keeley, 1 T. R. 699	458
Wise v. Metcalfe, 10 B. & C. 299, 5 M. & R. 235	174, 175, 176, 177, 178, 179, 180, 181, 184, 187, 189, 191 (a)
Wollen v. Smith, 9 Ad. & E. 505, 1 P. & D. 375	787
Wool v. The Copper Miners' Company, 7 C. B. 906	465
——, 14 C. B. 428	241, 469

TABLE OF CASES CITED.

	PAGE
Wood v. Cox, (not reported)	760(a)
— v. Smith, 5 M. & R. 124, 4 C. & P. 45	133
Worthington, In re, 5 C. B. 511	762(a)
Yaw v. Leman, 1 Wils. 21, 2 Stra. 1191	327, 329
Yea v. Leman, 1 Wils. 21, 2 Stra. 1191	327, 329
Zeevin v. Cowell, 2 Taunt. 203	663(a)

TABLE OF STATUTES.

EDWARD I.	PAGE
18, stat. 4. (Manner of levying fines.)	803
HENRY VIII.	
8, c. 7. (Right of voting: "clear yearly value.")	251
ELIZABETH.	
8, c. 2. (Costs, on rule to discontinue.)	776
13, c. 20. (Ecclesiastical leases.)	214
27, c. 4. (Voluntary conveyance.)	551(a)
28, c. 4. (Sheriff: fees for execution of process.)	269
39, c. 18 (Voluntary conveyance.)	551(a)
JAMES I.	
4, c. 3. (Costs for defendant upon a nonsuit or a verdict for him.)	795
CHARLES II.	
23, c. 1. (Coventry Act.)	484
29, c. 3, s. 4. (Statute of Frauds: sale of an interest in or concerning land.)	652
WILLIAM III.	
8 & 9, c. 11, s. 6. (Suggestion of death of one of several plaintiffs.)	790
ANNE.	
8, c. 14. (Landlord and tenant: year's rent, where goods taken in execution.)	278
GEORGE II.	
5, c. 30. (Bankrupt: maliciously suing out a commission.)	427
7, c. 8, ss. 4, 5. (Stock-jobbing Act.)	566
11, c. 19, ss. 16, 22. (Landlord and tenant: deserted premises.)	477
19, c. 37, ss. 2, 3. (Insurance: interest.)	377, 380, 387
GEORGE III.	
14, c. 48. (Life insurance: interest of assured.)	36
25, c. 77. (Building Act.)	211
38, c. 5. (Land-tax: by whom payable.)	326

GEORGE III.	PAGE
41, c. cxliv. (Lamesley and Tanfield Inclosure Act.)	512
42, c. 38. (Brewer: use of drugs.)	218
45, c. xciv. (Scarborough improvement act: jurisdiction of commissioners.)	743
48, c. 123. (Prisoner: discharge from custody.)	358
51, c. 87. (Brewer: use of drugs)	218
53, c. 24. (Appointment of Vice-Chancellors.)	803 (a)
57, c. xxix. (Metropolitan paving-act.)	754
c. 52. (Landlord and tenant: deserted premises.)	477
58, c. 45, ss. 59, 60. (Burial-ground rate.)	572
59, c. 134, ss. 24, 25. (Burial-ground rate.)	572
 GEORGE IV.	
3, c. 72, s. 26. (Additional burial grounds, purchase of)	576, 578, 579
9, c. 14. (Acknowledgment or promise to take a case out of the Statute of Limitations.)	305, 309
c. 15. (Amendment of record at nisi prius)	198, 204
c. 61. (Sale of spirituous liquors: licence)	210
10, c. 44. (Metropolitan Police Act)	495, 498
 WILLIAM IV.	
2, c. 39, s. 10. (Uniformity of Process Act: writs to save the Statute of Limitations.)	263, 265
c. 45, s. 27. (Reform Act: voters' lists.)	247
3 & 4, c. 42, s. 2. (Action against executor for a wrong done by his testator.)	787
s. 23. (Amendment of record at nisi prius.)	196, 199, 204
c. 74, s. 83. (Feme covert: acknowledgment to be taken abroad.)	364, 485
(Feme covert: acknowledgment; dispensation with notarial certificate)	410
(Feme covert: erasure in affidavit of verification)	449, 761
(Feme covert: enlarging time for return of commission.)	761
(Feme covert: affidavit of verification sworn at Milan.)	762
(Feme covert: filing certificate nunc pro tunc.)	767
(Feme covert: commissioner interested in the transaction.)	796
5 & 6, c. 76, s. 5. (Municipal Corporation Act: list of freemen.)	248
 7 WILLIAM IV. & 1 VICTORIA.	
c. 26, s. 24. (Wills Act.)	76
c. 45, ss. 1, 2. (Vestry meetings: notice of.)	576, 579
 VICTORIA.	
1 & 2, c. 110, ss. 14, 15. (Charging stock: jurisdiction of judge at chambers.)	731
s. 18, (Order for payment of money.)	124, 451
(Equitable charge.)	736
2 & 3, c. 47. (Metropolitan Police Act: jurisdiction of magistrates.)	487
s. 54. (Metropolitan Police Act: furious driving.)	756
c. 71. (Metropolitan Police Act: jurisdiction of magistrates.)	487

TABLE OF STATUTES CITED.

xxiii

VICTORIA.	PAGE
3, c. lix. (Faversham Oyster Fishery.)	1
3 & 4, c. 84, ss. 6, 13, 15. (Landlord and tenant: deserted premises.)	477
5 & 6, c. 100. (Registered designs.)	424
c. 122, s. 10. (Bankrupt: trading.)	527, 528, 531
6 & 7, c. 18, ss. 13, 17. (Registration of voters: notice of objection.)	245, 249
s. 40. (Registration of voters: notice of objection.)	249
c. 65. (Registered designs.)	424
c. 73, s. 37. (Attorney's bill: reference for taxation.)	729
7 & 8, c. 96, ss. 25, 57. (Insolvent: discharge from custody, debt not ex- ceeding 20 <i>l</i> .)	357
c. 110, ss. 66, 68. (Joint-Stock Company: registration of.)	331
8 & 9, c. 16, s. 36. (Companies Clauses Consolidation Act: execution against shareholders.)	459
c. 18, ss. 34, 38, 41, 50, 51, 68. (Lands Clauses Consolidation Act: costs of inquiry before the sheriff as to the amount of damage to land.)	810
c. 95, ss. 128, 129. (County-court: costs.)	505, 507
c. 100, ss. 45, 46, 47, 117. (Lunatic asylum.)	238
c. 109, s. 18. (Wagering contracts.)	562, 566
c. 112. (Attendant terms.)	532
9 & 10, c. 95, ss. 10, 33, 37. (County-court: bailiffs' fees.)	270, 273, 274, n.
s. 60. (County-court: "cause of action.")	501
s. 91. (County-court: attorneys' costs.)	283
s. 118. (County-court: interpleader.)	271, 274, 276
11 & 12, c. 43, s. 34. (Landlord and tenant: deserted premises.)	477
c. 45. (Winding-up Act: application of.)	331
c. 112, ss. 76—79. (Sewer's-rate.)	329, 330
12 & 13, c. 101, s. 12. (County-court: rules of practice.)	269, 270, 275
c. 106, s. 65. (Bankrupt: what a "cowkeeper" within the statute.)	524
s. 133. (Bankrupt: substituting a new petitioning-creditor's debt.)	774
s. 234. (Bankrupt: notice to dispute.)	774
c. 108. (Winding-up Act: application of.)	331
13 & 14, c. 61, s. 12. (County-court: appeal.)	278
14 & 15, c. 99, s. 14. (Evidence: act book of the Ecclesiastical court.)	142
c. cv. (Copper Miners' Company's Act.)	465
15 & 16, c. 54, s. 1. (County-court: attorneys' costs.)	282
c. 76, ss. 11, 12. (Common Law Procedure Act: renewal of writ of summons.)	262
s. 17. (Common Law Procedure Act: service of process.)	293
s. 52. (Common Law Procedure Act: striking out or amending pleadings)	241
ss. 55, 56. (Common Law Procedure Act: profert: pleading.)	240
s. 75. (Common Law Procedure Act, 1852: not possessed.)	440, 444
s. 75. (Common Law Procedure Act, 1852: distributive pleas.)	627
s. 138. (Suggestion of the death of defendant.)	784
ss. 169, 170. (Common Law Procedure Act, 1852: ejectment.)	397
	441, 448

VICTORIA.	PAGE
15 & 16, c. 76, s. 222. (Practice: amendment of record.) . . .	154, 192, 196, 477
s. 222. (Common Law Procedure Act, 1852: amendment of record upon a trial on noli tuel record.)	290
c. 83, s. 12. (Letters-patent: notice of objections.)	426
ss. 41, 43. (Letters-patent: particulars of breaches.) . . .	319, 320
s. 42. (Letters-patent: common law injunction for infringements.)	362
17 & 18, c. 31, s. 4. (Railway and Canal Traffic Act: rules and forms.) . . .	473
c. 75. (Husband and Wife: acknowledgment of deed by married woman.)	484, 806
c. 125, ss. 34, 35. (Common Law Procedure Act, 1854: appeal.) . .	189
s. 45. (Common Law Procedure Act, 1854: affidavits in answer to "new matter.")	757
s. 78. (Common Law Procedure Act, 1854: order for delivery up of the chattel, in detinue.)	730
s. 82. (Common Law Procedure Act, 1854: writ of injunction, rule for.)	362

DIGESTS AND ABRIDGMENTS.

Bacon's Abridgment, <i>Arbitrament and Award</i> (C.)	456
<i>Executors</i> (F.), l.	405
Brooke's Abridgment, <i>Covenant</i> , pl. 12.	405
Comyns's Digest, <i>Accord</i> (B. 4.)	627, 629
<i>Arbitrament</i> (D. 2.)	456
<i>Bye-Law</i> (B. 2.), (C. 4.)	24
<i>Fine</i> (H. 3.)	805
<i>Mortgage</i> (B.)	733
<i>Pleader</i> (2 W. 8.)	303
Cruise's Digest, tit. xxxv, ch. iv, § 26	804
Rolle's Abridgment, <i>Action sur Case</i> (2)	307
<i>Action sur Case</i> (H)	428

RULES OF COURT.

Michaelmas, 1833. Acknowledgments of deeds by married woman	799
Hilary, 1834. Acknowledgments of deeds by married woman	800
Hilary, 1853, r. 112. Judgment in ejectment	397

LEGAL MAXIMS.

<i>Nemo debet bis vexari</i>	153
<i>Omnia præsumuntur legitime facta, donec probetur in contrarium</i>	32, 769
<i>Transit in rem judicatam</i>	154, 163

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

Exchequer Chamber,

IN

TRINITY TERM,

IN THE

SEVENTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO USUALLY SAT IN BANCO IN THIS TERM, WERE,—
JERVIS, C. J., MAULE, J., CRESSWELL, J., AND CROWDER, J.

1854.

HILLS v. JOHN HUNT, the Younger, Foreman of the
Company or Fraternity of Free Fishermen and
Dredgermen of the Manor and Hundred of FAVER-
SHAM, in the County of KENT.

June 18.

THIS was an action brought by the plaintiff,—one of the free fishermen or dredgermen of the manor and hun-

The Faversham
Oyster Fishery,
—a company
in the nature of

a prescriptive corporation,—had power by its constitution (confirmed by an act of parliament of 3 Vict. c. lix) at certain courts called water-courts to make orders, rules, and regulations for the government and management of the company, and for imposing and levying fines and penalties on its members for the breach or non-observance of such orders, rules, and regulations; and also to appoint a foreman and a jury of twelve who should have the management and regulation of the fishery, and of the affairs of the company.

By a water-court order of the 31st of July, 1790, it was ordered, amongst other things, "that all such tenants [freemen or members of the company] as have boats shall work for the company in regular turn, *unless that he or his boat shall be incapable of doing business*, that is to say, each man, being so capable, shall succeed him who worked last, as he stands in the company's list." And by a subsequent order of the 29th of July, 1797, reciting the order of the 31st of July, 1790, it was "declared, ordered, and decreed that nothing in the said recited orders, or either of them, contained, was meant or intended to deprive or hinder, or shall deprive or hinder, the foreman and jury of this company, or the

1854. dred of Faversham, in the county of Kent,—against the
 Company or Fraternity of Free Fishermen and Dredger-
 HILLS men of Faversham,—who were sued in the name of their
 v.
 HUNT. foreman, the nominal defendant, by virtue of the statute

major part of them assembled on the company's affairs, from exercising at all times their antient and accustomed discretionary powers of regulating the business of the said company, by postponing or setting aside the turn of any of the tenants of this manor and hundred, in doing any business of the said company, for reasons appearing to the said foreman and jury, or the major part of them, to be satisfactory, expedient, or proper, for that purpose."

On the 12th of July, 1852, an order to the following effect was made *by the foreman and jury*:—"As the commencement of the season for the selling of oysters is drawing near, in order to provide salesmen, it is ordered that the foreman put out a notice for persons, freemen of the company, who are desirous of going to London as *salesmen*, to give in their names to him or any one of the jury *on or before the 19th instant*; and that the jury proceed to the electing of such on or as soon after that time as convenient. And, in order that the company may be provided with fitting and proper vessels to take the oysters to market, it is ordered that notice be posted at the usual place, to require those freemen that have boats fitting and proper, to give notice to the foreman or any one of the jury of their intention of working for the company."

There was no evidence of the giving of such notice by the foreman under the above order; but the plaintiff had notice of it on the 14th of July.

On the 19th, a further order was made by the foreman and jury, as follows:—"It is ordered that three men (naming them) go to Billingsgate, as salesmen. The following are the names of those that have given notice, according to the notice of the 13th of July, of their intention of carrying oysters for the company (naming the men and their boats): and it is ordered that the above-named boats do carry the oysters to Billingsgate Market *and that no boats be allowed to take a turn with them until after the 31st of October.*"

The plaintiff not having given notice of his intention to carry *until the 18th of August*, the defendant,—acting under the order of the 19th of July,—refused to employ him and his boat until after the 31st of October.

Before the year 1850, the practice had been, that the foreman and jury ascertained, either by notice or by personal application, before the commencement of each season, who could carry, and then the freemen, after they had ceased to be employed elsewhere, gave notice, and came in after standing by *one* turn. The plaintiff, himself had, however, been excluded in the year 1851, by reason of his omission to give notice of his readiness.

In an action against the foreman for excluding the plaintiff and his boat from turns of carrying, under the above circumstances:—

Held, that the order of the 31st of July, 1790, was properly alleged in the declaration as giving the freemen having boats an absolute right to work in turn, and that the incapacity of the man or his boat, not being in the nature of a qualification or limitation of the right, need not be noticed.

The defendant justified under the orders of the 12th and 19th of July, 1852, stating, that, by the former, those freemen who intended to work for the company were thereby required to give notice of such their intention *on or before the 19th of July*; that the plaintiff omitted to give such notice; that, by the order of the 19th, notice was given that such only of the freemen as had given notice should be employed in carrying oysters for the company, and that those who had not given notice should be excluded until after the 31st of October; and that, by reason of the last-mentioned order or regulation, the defendant, as foreman, refused to employ the plaintiff, as he lawfully might, &c.:—Held, that the plea was not sustained by the production and proof of the order above set forth; and that the plea could not be made good by striking out the order of the 12th of July.

Quære, whether the foreman and jury had power to make the order of the 19th of July, 1852, and whether, if they had, it was a reasonable one,—the notice of the 12th giving no intimation of the time at which the freemen were required to give notice of their intention to carry, nor informing them of the consequences of their omission to do so?

The court will not allow a special case to be amended, by raising a point which the parties have not raised for their consideration.

3 Vict. c. lix, s. 7, the local act for the regulation of the company, intituled "An act for granting certain powers to the Faversham Oyster Fishery Company,"—to recover damages for not employing the plaintiff and his vessel in carrying oysters to Billingsgate Market, London, in his regular turn, from the 19th of August to the 31st of October, 1852, whereby the plaintiff lost several voyages, and the gains which he would have made thereby.

The declaration stated, that, long before and at the time of the committing of the grievances thereafter mentioned, and before the passing of the said statute, the said company was, and from time whereof &c. had been, a company in the nature of a prescriptive corporation, called or known by the name of "The Company or Fraternity of Free Fishermen and Dredgermen of the Manor and Hundred of Faversham, in the county of Kent," and had carried on a certain oyster-fishery in the manor and hundred of Faversham, in the said county of Kent, and the arms of the sea adjoining thereunto: That, from time whereof &c., the freemen or members of the said company had of right bred, laid, dredged for, caught, had, and taken, and still of right ought to breed, lay, dredge for, catch, have, and take oysters and oyster-brood in the waters and creeks within the said fishery, exclusive of all other persons, the said company paying, in consideration thereof, a yearly sum of 23*s.* 4*d.* to the lord of the said manor and hundred of Faversham for the time being: That certain courts, called "water-courts," had from time whereof &c. been held before the steward of the said manor and hundred, at which courts the members, or the majority of the members, of the said company or fraternity then present had, during all the time aforesaid, made orders and regulations for the government and management of the said company: That, by the orders and regulations of the said company, duly made as aforesaid, for the purpose of regulating the rota-

1854.

HILLS
v.
HUNT.

1854.

HILLS
v.
HUNT.

tion in which the freemen or members of the said company should lay, dredge for, catch, have, and take oysters and oyster-brood in the waters aforesaid, it was provided that all the freemen or members of the said company should come in according to their situation on the company's lists; that the next freeman or member on the said several lists to those who had the last turn, should be employed in all business of the company, so that every freeman or member might have his turn regularly in rotation; and also that all such freemen or members as should have boats, should work for the said company in regular turns, unless he or his boat should be incapable of doing the business, that is to say, each man, being so capable, should succeed him who worked last, as he should stand in the company's list: That, before and at the time of the committing by the said company of the grievances thereafter complained of, to wit, on the 19th of August, 1852, the plaintiff was, and from thence continually hitherto had been, one of the admitted freemen or members of the said company, and the name of the plaintiff then stood next on the list of the said company, and it was then his turn to be employed with his said boat according to the said rule or regulation aforesaid; and the plaintiff, by reason thereof, and then having a boat, and the plaintiff and his boat being then next in regular turn in the said list of the said company, and being then capable of doing the work of the said company, ought of right to have been employed in his regular turn among the freemen or members of the said company, in doing the work of the said company with his said boat as aforesaid, and to have continued in such employment during the usual and regular duration thereof, to wit, for the space of six months: Yet the said company, well knowing the said premises, but intending to deprive the plaintiff of the exercise of his said right to such work and employment

with his said boat, in his said regular turn as aforesaid, and contriving and intending to prefer other members of the said company before the plaintiff, to wit, on the day and year last aforesaid, and on divers other days and times afterwards, and while the plaintiff was such freeman and member as aforesaid, refused to employ the plaintiff and his said boat in his regular turn in doing the said work of the said company in manner aforesaid: By means whereof, the plaintiff had lost and been deprived of all the wages, profits, and advantages which he might and would have derived from being so employed with his said boat as aforesaid by the said company as aforesaid, and which the said company had from that time wholly refused to pay or allow to the plaintiff; and the plaintiff and his said boat had been and were, by means of the premises, wholly unemployed: And the plaintiff claimed 100%.

1854.

HILL
v.
HUNT.

The defendant pleaded,—first, not guilty.

First plea.

Secondly,—that, by the orders and regulations of the said company existing and in force at the several times of the committing of the said supposed grievances in the declaration mentioned, it was not so provided as in the declaration in that behalf alleged.

Second plea.

Thirdly,—that the plaintiff did not at any of the said times of the committing of the said supposed grievances, stand next on the list of the said company, nor was it then his turn to be employed with his said boat, as in the declaration in that behalf alleged.

Third plea.

Fourthly,—that the plaintiff and his boat were not, at any of the said times of the committing of the said supposed grievances, ready for or capable of doing the work of the said company, as in the declaration in that behalf alleged.

Fourth plea.

Fifthly,—that, after the passing of a certain act of parliament &c. (3 Vict. c. lix) for granting certain powers to the Faversham Oyster Fishery Company, and before any of the times of the committing of the said supposed

Fifth plea.

1854.

HILLS

v.

HUNT.

grievances, and before the period or season of the year wherein oysters or oyster-brood can lawfully be dredged for, caught, or taken, to wit, on the 12th of July, 1852,—the same being a fit and convenient time for that purpose,—the foreman and jury of the said company for the time being, having then the management and regulation of the said fishery, and of the affairs of the said company, as in the said act of parliament in that behalf mentioned, in order that the said company might be provided with fit and proper vessels to take the oysters of the said company to market at such period or season of the year as aforesaid, and that the trade and business of the said company might then be properly and adequately conducted and carried on, caused a certain notice and order to be duly given and made to the freemen and members of the said company,—the said notice and order being proper and reasonable in that behalf, and being a notice or order of such and the like nature as the foreman and jury of the said company for the time being had before the passing of the said act of parliament been authorised and impowered from time to time to give and make in the management and regulation of the said fishery and of the affairs of the said company,—and thereby directed and required that those freemen or members of the said company who had vessels fitting and proper for the purposes aforesaid, and intended to work for the said company at the period or season of the year for dredging for, catching, and taking oysters as aforesaid, should, on or before the 19th day of July, in the year aforesaid, give notice to the foreman, or to any one of the jury of the said company, of their intention of working for the said company as aforesaid; of which said notice and order the plaintiff, immediately after it was so given and made as aforesaid, and before the said 19th day of July, in the year aforesaid, had due notice: That, although, afterwards, and in pursuance of the said

notice and order so given and made as aforesaid, before and on the said 19th day of July, in the year aforesaid, divers of the said freemen and members of the said company, having vessels fitting and proper for the purpose, gave notice to the foreman and jury of the said company of their intention of working for the said company as aforesaid; yet that the plaintiff wholly neglected and omitted so to do, and did not at any time before or on the said 19th day of July, in the year aforesaid, give any such notice either to the foreman or to any one of the jury of the said company; and that afterwards, and before the period or season of the year for dredging for, catching, and taking oysters as aforesaid, and before any of the said times of the committing of the said supposed grievances, to wit, on the 19th of July, in the year aforesaid, by a certain other order and regulation then made for and on behalf of the said company by the foreman and jury of the said company for the time being,—the same being a proper and reasonable order and regulation in that behalf, and being an order and regulation of such and the like nature as the foreman and jury of the said company for the time being had before the passing of the said act of parliament been authorised and empowered from time to time to make in the management and regulation of the said fishery, and of the affairs of the said company,—it was ordered and provided that the boats or vessels of those of the said freemen or members of the said company who had so given notice of their intention of working for the said company as aforesaid, should be employed to work for the said company, and to carry the oysters of the said company to market, to wit, to Billingsgate Market, and that no other boats or vessels should be allowed to take turn with them, or be employed in working and carrying the oysters as aforesaid with the said boats or vessels of the said freemen or members who had so given notice as aforesaid, until

1854.

HILLS
v.
HUNT.

1854.

 HILLS
 v.
 HUNT.

after the said 31st day of October, in the year aforesaid, —of which said last-mentioned order and regulation the plaintiff, immediately after the making thereof, and before any of the said times of the committing of the said supposed grievances, to wit, on the said 19th day of July, in the year aforesaid, had due notice ; and, by reason of the said several premises aforesaid, and by virtue of the said last-mentioned regulation, the defendant, according to his duty in that behalf, as such foreman of the said company as aforesaid, afterwards, and at the said several times in the said declaration mentioned,—the same being respectively after the said 19th day of July, and before the said 31st day of October, in the year aforesaid, —refused to employ the plaintiff and his boat, as in the declaration in that behalf mentioned, as he lawfully might for the cause aforesaid, he, the plaintiff, and his said boat, not being then entitled, by reason of the said several premises aforesaid, to be so employed as aforesaid.

Sixth plea.

Sixthly, that, before any of the said times of the committing of the said supposed grievances, and before the period or season of the year wherein oysters and oyster-brood can lawfully be dredged for, caught, or taken, to wit, on the 12th of July, 1852, the same being a fit and convenient time for that purpose, the foreman and jury of the said company for the time being, for and on behalf of the said company, in order that the said company might be provided with fit and proper vessels to take the oysters of the said company to market at such period or season of the year as aforesaid, and that the trade and business of the said company might then be properly and adequately carried on, caused a certain notice and order to be duly given and made to the freemen and members of the said company,—the said notice and order being proper and reasonable in that behalf, and thereby directed and required that those freemen or

members of the said company who had vessels fitting and proper for the purpose aforesaid, and intended to work for the said company at the period or season of the year for dredging for, catching, and taking oysters as aforesaid, should, on or before the 19th of July, in the year aforesaid, give notice to the foreman, or to any one of the jury of the said company, of their intention of working for the said company as aforesaid,—of which said notice and order the plaintiff, immediately after it was so given and made as aforesaid, and before the said 19th of July in the year aforesaid, had due notice: That, although, in pursuance of the said notice and order so given and made as aforesaid, afterwards, and before and on the said 19th of July, in the year aforesaid, divers of the freemen and members of the said company, having vessels fitting and proper for the purpose, gave notice to the foreman and jury of the said company of their intention of working for the said company as aforesaid: Yet that the plaintiff wholly neglected and omitted so to do, and did not at any time before or on the said 19th of July, in the year aforesaid, give any such notice either to the foreman, or to any one of the jury of the said company: and that afterwards, and before the period or season of the year for dredging for, catching, and taking oysters as aforesaid, and before any of the said times of the committing of the said supposed grievances, to wit, on the 19th of July, in the year aforesaid, by a certain other order and regulation then made for and on behalf of the said company, by the foreman and jury of the said company for the time being,—the same being a proper and reasonable order and regulation in that behalf,—it was ordered and provided that the boats or vessels of those of the said freemen and members of the said company who had so given notice of their intention of working for the said company as aforesaid, should be employed to work for the said company, and to carry the oysters of the said

1854.

HILLS
v.
HUNT.

1854.

HILLS

v.

HUNT.

company to market, to wit, to Billingsgate Market ; and that no other boats or vessels should be allowed to take turn with them, or be employed in so working and carrying the oysters as aforesaid with the boats or vessels of the said freemen and members who had so given notice as aforesaid, until after the 31st of October, in the year aforesaid,—of which said last-mentioned order and regulation the plaintiff, immediately after the making thereof, and before any of the said times of the committing of the said supposed grievances, to wit, on the said 19th of July, in the year aforesaid, had due notice : That the said several times when the said notice or order in that plea first above mentioned, and the said order and regulation in that plea last mentioned, were respectively given and made as aforesaid, were times and periods of the year when the general annual courts of the said company were not, and ever since the passing of the said act of parliament in the fifth plea mentioned had not been, and could not lawfully be, held ; and that, at such times and periods respectively, and during the intervals between the general courts of the said company, the foreman and jury of the said company for the time being had, and from time immemorial had always had, the management and regulation of the said fishery and of the affairs of the said company for and on behalf of the said company, and had used to give and make, and of right had given and made, from time to time, for and on behalf of the said company, such notices, orders, and regulations in respect thereof as had by them been deemed necessary or expedient in that behalf ; and by virtue and in consequence thereof, and because the said notice and order in that plea first above mentioned were at the said several times when they were so respectively given and made as aforesaid deemed by the said foreman and jury of the said company for the time being to be, and the same were then, necessary and

expedient for and in respect of the management and regulation of the said fishery and of the affairs of the said company, the same respectively were then so given and made as aforesaid; and by reason of the several premises aforesaid, and by virtue of the said last-mentioned order and regulation, the defendant, according to his duty in that behalf as such foreman of the said company as aforesaid, afterwards, and at the said several times in the declaration mentioned,—the same being respectively after the said 19th of July, and before the 31st of October, in the year aforesaid,—refused to employ the plaintiff and his said boat, as in the declaration in that behalf mentioned, as he lawfully might for the cause aforesaid, he the plaintiff and his said boat not being then entitled, by reason of the said several premises aforesaid, to be so employed as aforesaid.

Upon these several pleas, the plaintiff joined issue.

The cause came on to be tried before Jervis, C. J., and a special jury, at the sittings in London after Trinity Term, 1853, when a verdict was found for the plaintiff, damages 40*s.*, subject to the opinion of the court on the following case:—

The company, as stated in the declaration, is in the nature of a prescriptive corporation, and was established, and exists, for the purpose of breeding, purchasing, and maturing, dredging for, and taking oysters within the limits in the declaration mentioned, and selling and disposing of such oysters.

The oyster season begins on or about the 4th of August, and ends in April or May; and, during that period, the members or freemen of the company, or the tenants of the manor of Faversham, as they are sometimes called, are employed, some of them as dredgermen, others, who have boats fit for the purpose, as carriers, to carry the oysters to Billingsgate, and others as salesmen stationed at Billingsgate to sell the oysters, for which

1854.

HILLS
v.
HUNT.

1854.

HILLS
v.
HUNT.

services certain payments are made from the funds of the company. None of the freemen are compellable to work for the company; and many of them, therefore, seek to obtain more remunerative employment elsewhere, regardless of the company.

The orders, rules, and regulations for the government of the company are made in certain courts called water-courts, held in the manner stated in the declaration; and the orders, rules, and regulations which have been so made from time to time, were put in and proved at the trial, and were to be taken as part of the case.

The plaintiff, being a freeman of the company, had, during the seasons previous to 1852, that is to say, during the seasons between 1847 and 1852, on more than one occasion, been excluded for non-compliance with the orders of the company, and on account of the unfitness of his boat. In the intervals between the oyster seasons, those freemen who have vessels have been accustomed to employ them in various ways, and in other trades, and in foreign voyages.

Before the commencement of the oyster season of 1852, the plaintiff with his vessel had been employed in carrying wool from Faversham to Dunkirk; and, having returned from his last voyage to Dunkirk on the 18th of August, he gave notice to the defendant on that day that he was ready to carry oysters to London.

The 19th of August was the day on which the plaintiff ought to have been employed in his regular turn in carrying oysters to London, according to his position on the list of the company; and his vessel was then fit and ready for such employment.

The company refused to employ the plaintiff, on the ground that he had not complied with the rules and orders hereinafter mentioned, and gave him notice, that, in consequence of such non-compliance, he would not be employed until after the 31st of October, 1852.

The plaintiff continued, notwithstanding this refusal, to have his vessel in readiness, on seven separate occasions when his turn came, before the 31st of October; and, on each occasion, gave notice to the defendant on the previous day of his readiness to be employed in carrying oysters to London, in the usual manner. During the whole time, the plaintiff's boat was fit and ready for such employment. (a)

1854.

 HILLS
v.
HUNT.

(a) The following is a copy of the evidence as set out from the judge's notes:—

Examination in chief of William Hills, the plaintiff:—
"Married man, and freeman. Took my freedom in 1837. I have a boat, the Mary Ann, a sailing-boat of 18 tons; proper to carry oysters to London. There are about 280 freemen. The oyster season begins the 4th of August, and ends in April or May. We get 3*l.* a voyage. We find a man, and provisions. The profit is two guineas. At times I work to France. Last summer, I carried wool between Faversham and Dunkirk. Returned in August: my turn came the 19th. I know the defendant: he is foreman of the jury. There are twelve jurymen. I gave notice on the 18th, to take on the 19th. The defendant said he should not put oysters in, because I ought to give notice of my turn. I was not to take in till October came round. My turn came the 24th of August. I applied the 23rd; next, the 31st; then, the 7th, 16th, and 25th of September, and the 4th and 13th of Octo-

ber. At these times, I was ready with my boat to carry oysters to London. I heard there was a notice: I heard of it the 14th of July: it did not mention any particular time. I thought it time enough to give notice when I was ready to carry. My turn came the 24th of November. I applied to be allowed to carry. I was in the house in the evening. He (Hunt) told me the man above was to take; but he altered his mind, and sent word to the men below."

Cross-examination. "There had been a similar regulation the year before: the boats were to send in notice in July. My boat worked the year before. I sent in my name in July. Several were excluded the year before, because they did not send their names in. *I was excluded in 1850 by the same rule.* In 1849, I sent in my name. I bought my vessel in 1848. I had a boat before,—the Providence,—and was excluded because she was unfit. In August, Mr. Watson employed my boat to carry wool. He began in April. I arrived home the 15th or 16th of August, and he had no more

1854.

HILLS
v.
HUNT.

It was further proved in evidence, that the general regulation and management of the fishery, and of the affairs of the company, is vested in the foreman and jury ;

wool to go. I was not ready to take my turn when the season first began. I went to Hunt's house at 9 in the morning on the 18th. I saw him about 2 o'clock. I applied to take in oysters the next day. There were three besides me excluded:—Clark, Day, and Hill. Hill had full employment elsewhere: the others did not have full employment; the turns had passed over them and come to Clark, who stood before me. From the 12th to the 15th of August, I made 4*l*. and 5*l*. If there had been a load of wool, I should have taken it; but, not having a freight, I applied for the oysters. I said nothing to Mr. Watson about my turn for the oysters. On the 4th of August, I earned 12*l*. 16*s*. From June 9th to August the 12th, I had been six voyages, earning about the same. On the 21st of September, I sailed from Faversham with cargo to France: earned about the same. Came back the 24th of September, knowing I should not be allowed to take. We sailed again the 31st of October. Began to take in, the 28th of October. Came back about the 2nd of November. On the 19th of August, I went dredging. I could have done both. We lose our turn of dredging, when we go to London. Worth about 3*l*. Clark was away on

the 24th of November. Samuel Day had a small boat. William Harris stood above him. Day stood on the list for the 24th. On the 23rd, I went to Hunt about 9 o'clock in the evening. I did not expect a turn that week, because there were boats before me. My boat was above bridge: I said I would endeavour to get the boat down the creek. I did not say I would take the turn after the 24th: I was not sure I could get my boat down. My boat was not down; and he put it into Chapman's boat. I applied twice again to Hunt, —the 18th of August, and the 23rd of November. The 23rd of August, I applied to Oakenfold. I put the dates down from time to time as I made the applications. As my turn came, I put it down on this paper."

Re-examination. "I took the paper from the almanack. Crossed each day, as it occurred. My earnings in the wool trade were uncertain: my turn was certain. The 24th of November, Hunt told me Day was to go, about 7 or 8: the tide was 10 o'clock. I perhaps ought to have got down."

Examination of John Hunt, the defendant. "I have been foreman of the fishery for more than thirteen years. The jury is twelve. I am well acquainted with the course of the com-

and that the jury is composed of twelve freemen ; and that, at a meeting of the foreman and jury, held on the 12th of July, 1852, the following order was made :—

“ As the commencement of the season for the selling of oysters is drawing near, in order to provide salesmen, It is ordered that the foreman put out a notice for per-

pany, and have been a member thirty years. They have always used their power by regulating the work, the carrying of oysters, and all matters relating to the company. They order the time when, the places where, and the quantity. They regulate the boats to go. There are many who go to work on other oyster-fisheries, and are excluded by court and jury. When they return, they must give notice of their return. They ascertain what boats are fit to go ; and, if unfit, they exclude them. The Providence, the plaintiff's boat, was excluded because unfit. Boats are excluded year after year, from various causes. The practice of requiring notice from the freemen who had boats, and intended to carry, began in 1850. Before that, we ascertained by personal application who could carry, before the commencement of each season, and the freemen, after they had ceased to be employed elsewhere, gave notice, and came in after standing by one turn ; so that, before 1850, when Hills applied on the 18th, he would have stood by from the 19th, and have come in the next turn, if he gave notice. It has always been ascertained,

either by notice or personal application, what boats are at home and will work for the company. The duties were the same before 1840, as now. I do not remember instances of strangers being employed to carry oysters before 1840. After he has slipped by one turn, he is entitled to the next turn, without further application, if he has not gone elsewhere. That would have been the practice now, but for the order of the jury.”

Examination of John Smith.
“ I am seventy-five years of age, and have been a dredger-man all my life. We used to take everything in rotation. We used to meet as occasion required, altering the starts, and so on. If the boat was not fit, they would not put them in. There were always plenty of boats : if there were not boats enough, they must hire others. We buy common oysters, and lay them there. The foreman of the jury makes the resolutions as to the boats to carry to Billingsgate, and has always done so. When a man comes in in the season, he must give a week's notice, or stand by a turn. That was so before the late order.”

1854.

HILLS

v.

HUNT.

Order of July
12, 1852.

1854.

HILLS

v.

HUNT.

sons, freemen of the company, who are desirous of going to London as salesmen, to give in their names to him, or any one of the jury, *on or before the 19th instant*; and that the jury proceed to the electing of such, on or as soon after that time as convenient. And, in order that the company may be provided with fit and proper vessels to take the oysters to market, it is ordered that notice be posted at the usual place, to require those freemen that have vessels fitting and proper, to give notice to the foreman, or any one of the jury, of their intention of working for the company."

At a meeting of the foreman and jury, held on the 19th of July, 1852, the following order was made:—

Order of July
19, 1852.

"It is ordered that three men go to Billingsgate, viz. W. Oakenfold, senior, first and permanent salesman, Thomas Ely, second, and to stay as circumstances and market allow, G. Jemmett, third, to continue till ordered home.

*Meaning a notice given in pursuance of the last clause in the order of the 12th of July.

"The following are the names of those that have given notice, according to the notice of the 13th of July,* of their intention of carrying oysters for the company:—Jarman Dane, Mayflower; William Harris, Davington; Ch. Lightfoot, Cruiser: Thomas Chapman, Queen; Joseph Brenchley, Eclipse; G. Gemmett, Victoria; E. Dane, Fidelity; W. Clark, Liberty: T. Wilson, Endeavour.

"And it is ordered that the above-named boats do carry the oysters to Billingsgate Market, and that no boats be allowed to take a turn with them, until after the 31st of October."

On the 14th of July, the plaintiff had notice of the order of the 12th of July; but he considered it time enough to give such notice when he was ready to carry the oysters, and therefore gave no notice to the company until the 18th of August, as above mentioned; although he had been excluded from carrying, in the year 1850, in

consequence of his not having sent in his name, as required by the order then in force.

1854.

HILLS
v.
HUNT.

The defendant, acting on the order of the 19th of July, refused to employ the plaintiff and his vessel to carry oysters to London, as before stated.

It was further given in evidence, on behalf of the defendant, that the foreman and jury always had been accustomed to exercise the power of regulating the work,—the carrying of oysters,—and all matters relating to the company; that the foreman and jury order the time when, the places where, and the quantity of oysters to be carried: and that they regulate the boats, determining which are to go, and excluding such as they deem unfit; that there are many freemen who go to work for other oyster-fisheries, and are for that reason excluded; that the practice of requiring notice from the freemen who had boats, and intended to carry oysters to London, began in 1850; that, before that time, the practice had been, that the foreman and jury ascertained, either by notice or by personal application, before the commencement of each season, who could carry, and then the freemen, after they had ceased to be employed elsewhere, gave notice, and came in after standing by one turn, so that, before 1850, when the plaintiff applied on the 18th, he would have stood by from the 19th, and have come in the next turn, if he gave notice; but there was no evidence that this practice existed under any water-court or jury orders; that, when a freeman had thus been passed by one turn, he was allowed the next turn, without further application, if he had not gone elsewhere; and that such would have been the practice now, but for the order of the foreman and jury.

Either party was to be at liberty to refer to the statute of the 8 Vict. c. lix, and any of the water-court or jury orders; and the evidence given at the trial was to be taken from the judge's notes. The copy of the

1854.

HILLS

v.

HUNT.

said statute, and of such of the water-court and jury orders as were annexed to the case, were to be taken as part of the case. The court were to be at liberty to draw inferences of fact, and to have all the same powers as the jury at the trial.

Upon these facts, the plaintiff contended, that the fifth and sixth pleas were not proved; that the foreman and jury had no power to make the order of the 19th of July; and that such order was unreasonable and invalid.

The defendant, on the other hand, contended that the plaintiff failed to prove his case under the second issue raised upon the pleadings, inasmuch as there was no sufficient evidence of the rules and regulations of the company alleged in the declaration, and those upon which he relied in support of his case had been qualified and controlled by others which were inconsistent with his claim, and supported in substance the authority of the foreman and jury, and the orders under which the defendant had acted in excluding the plaintiff upon the occasions in question. The defendant also contended that the fifth and sixth pleas were proved; that the foreman and jury had power to make the order of the 19th of July; and that the order was reasonable and valid.

Questions.

If the court should be of opinion that the case upon the part of the plaintiff on the second issue was proved, and that the defence set up by either the fifth or the sixth plea of the defendant was not sustained, the verdict was to be entered for the plaintiff upon all the issues, damages 40s. If the court, on the contrary, should be of opinion, either that the case on the part of the plaintiff upon the second issue was not proved, or that the defence set up either by the fifth or by the sixth plea of the defendant was sustained, then the verdict already entered for the plaintiff was to be set aside, and a verdict entered for the defendant.

The following are the water-court orders referred to in the case :—

“ Manor and hundred of Faversham. The water-court of the Hon. Lewis Thomas Watson, lord of the manor and hundred of Faversham, in the county of Kent, holden at Faversham, within the said manor and hundred, on Saturday next before Lammas Day, to wit, the 31st of July, 1790, and in the thirtieth year of the reign of our sovereign lord, George the Third, by the grace of God, of Great Britain, France, and Ireland King, defender of the Faith &c.

“ At this court, the following amongst other orders were made:—First, it is ordered, that all the oyster-grounds of and belonging to this manor and hundred and this oyster-fishery, shall be opened at such times and places, and in such manner only as the foreman, or his deputy, and the jury, or the major part of them, shall from time to time order and direct ; and that no tenant or freeman of this manor and hundred shall dredge for or catch any oysters in or from any other part of the said oyster-grounds than such only as shall be opened by the foreman, or his deputy, and the jury, or the major part of them, as aforesaid, upon pain that every tenant offending against this order shall forfeit and pay for every such offence the sum of 20*s.*, to be levied to the use of the lord of this manor and hundred.

“ Also, it is ordered, that no tenant shall dredge on any of the oyster-grounds of or belonging to this oyster-fishery and manor and hundred before the firing of the company’s gun, upon pain of forfeiting for every offence 3*s.* 4*d.*, to be levied to the use aforesaid, and also to the treasurer of the said company for the time being, on demand, the further sum of 1*s.*; and, if any tenant shall refuse to pay the said forfeiture of 1*s.* for every such offence, over and above the said 3*s.* 4*d.*, then the overseers for the next ensuing day whereon the said company

1854.

HILLS

v.

HUNT.

Water-court
order of July
31, 1790.

1854.

HILLS
v.
HUNT.

shall work on the oyster-grounds, shall stop the said penalty of 1s. out of such tenant's oysters, who shall account for it, and apply the same to the company's use.

"Also, it is ordered, that no tenant, either by himself or any of his servants, shall anchor or wilfully run on shore his smack, or any other smack or vessel in which he shall be on board, on any of the said oyster-grounds, so that the same may ground thereon, on pain of forfeiting for every offence 2s. 6d., to be levied to the use of the lord of this manor and hundred, or immediately stopped out of the tenant's stint or stints of oysters by the water-bailiff, to the like use.

"Also, it is ordered, that no tenant of this manor and hundred shall take or catch himself, or permit his servants or any other persons on board his vessel, at the time of trying the oyster-grounds of or belonging to this company, or at any other time, to take or catch any oysters, except for the use of this company, whether the same oysters shall be brought on shore or not, upon pain of forfeiting and paying 2d. for every oyster or brood of oysters that shall be so caught, to be levied and paid to the overseers of the day, to the use aforesaid, and, in default thereof, the overseers to deduct the same out of the next day's oysters to be caught by such tenant or tenants so offending against this order.

"Also, it is ordered, that the foreman, or his deputy, and the major part of the jury when assembled, shall, when they think proper, sell or contract for the sale of any quantity of oysters to be caught, or which shall be agreed to be caught, on any of the oyster-grounds of or belonging to this oyster-fishery and manor and hundred, to such persons and at such prices as they shall think proper.

"Also, it is ordered, that every tenant of this manor and hundred shall regularly catch one stint of oysters

in one day, and no more, for his own stint only; and that the absent tenants' oysters shall be caught by the tenants in turn, as they stand on the list in the books of this company, and not otherwise; and every tenant offending against this order shall forfeit and pay for every offence the sum of 20s., to be levied to the use of the lord of this manor and hundred.

1854.

HILLS
v.
HUNT.

"It is ordered by this court, that, as well in the overseers' list, as in all other lists of this company, the foreman and jury shall have no precedency with respect to the half-stints or any other work or employment to be done for the use of this company; but that they and all other tenants shall come in according to their situation in the company's list, and that the next tenants on the said several lists to those who had the last turn shall be employed in all businesses of the company, so that every tenant may have his turn regularly in rotation without partiality or preferring any one before the other: but this order not to affect the duty of the foreman of this company as third overseer.

"It is ordered also, that all such tenants as have boats shall work for the company in regular turn, unless that he or his boat shall be incapable of doing business, that is to say, each man, being so capable, shall succeed him who worked last, as he stands in the company's list, without any preference, as being foreman, or belonging to the jury, or otherwise.

"James Tappenden, Steward."

"Manor and hundred of Faversham. The water-cour of the Right Hon. Lewis Thomas, Lord Sondes, Baron Sondes, of Lees Court, in the county of Kent, lord of the manor and hundred of Faversham, in the said county, holden at Faversham, within the said manor and hundred, on Saturday next before Lammas Day, to wit, the 29th of July, 1797, and in the thirty-seventh

Order of July
29, 1797.

1854.

HILLS

v.

HUNT.

year of the reign of our sovereign lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith.

“At this court, the following amongst other orders were made :—Whereas, at a water-court holden the 31st of July, 1790, it was ordered and declared, that, as well in the overseers’ lists as in all other lists of this company, the foreman and jury should have no precedency with respect to half-stints or any other work or employment to be done for the use of this company, but that they and all other tenants should come in according to their situations or the company’s list, and that the next tenants on the said several lists to those who had the last turn, should be employed in all business of the company, so that every tenant might have his turn regularly in rotation, without partiality or preferring any one before the other, but the said order was not to affect the duty of the foreman of this company as third overseer; and also that all such tenants as should have boats, should work for the company in regular turn, unless that he or his boat should be incapable of doing the business,—that is to say, each man, being so capable, should succeed him who worked last, as he should stand in the company’s list, without any preference, as being foreman, or belonging to the jury, or otherwise: Now, it is hereby declared, ordered, and decreed by this court, that nothing in the said recited orders, or either of them, contained, was meant or intended to deprive or hinder, or shall deprive or hinder, the foreman and jury of this company, or the major part of them assembled on the company’s affairs, from exercising at all times their antient and accustomed discretionary powers of regulating the business of the said company, by postponing or setting aside the turn of any of the tenants of this manor and hundred, in doing any business of the said company, for reasons appearing to the said foreman and

jury, or the major part of them, to be satisfactory, expedient, or proper for that purpose.

1854.

“James Tappenden, Steward.”

HILLS
v.
HUNT.

“Manor and hundred of Faversham. The water-court of the Right Hon. Lewis Richard, Lord Sondes, Baron Sondes, of Lees Court, in the county of Kent, lord of the manor and hundred of Faversham, in the said county, holden at Faversham, within the said manor and hundred, on Saturday, the 5th of February, 1820, and in the First year of the reign of our sovereign lord George the Fourth, by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith.

Water-court
order of
February 5,
1820.

“At this court, the following amongst other orders was made:—Also, it was ordered, that any tenant or tenants of this manor and hundred, who shall engage to work and be employed in any oyster-fishery other than the oyster-fishery of this manor and hundred, shall not be allowed to work for this company during that season, unless they shall give one week’s notice in writing to the foreman of this company of their desire to go to work for this company, and shall at the same time give proof that they cannot get any further employment in any such other fishery in which they shall have been so employed.”

Quain (with whom was *Byles*, Serjt.), for the plaintiff. (a) The orders of the 31st of July, 1790, and the 29th of July, 1797, together with the statute 3 Vict. c. lix, substantially prove the custom relied on by the

(a) The points marked for argument on the part of the plaintiff, were,—“That the order of the 19th of July was invalid, as being unreasonable, and not such an order as the foreman and jury were entitled or accustomed to make; and that the pleas were not proved, as no such orders were made as set out in the last two pleas.

1854.

HILLS
v.
HUNT.

plaintiff. The main point arises as to the validity of the notice of the 12th of July, 1852, and of the order of the 19th, founded thereon. These, it is submitted, cannot be put higher than an ordinary bye-law by a corporation, as to which it is essential to its validity that it should be reasonable. Here, the orders themselves, as well as the manner in which they are to be carried out, are unreasonable. The order of the 12th of July directs that a notice be posted requiring those freemen of the company who had fit vessels to give notice of their intention of working for the company in the conveyance of oysters to London. It does not state when the notice is to be given, or what shall be the penalty for a default. Then comes the order of the 19th of July, which, after giving the names of certain boats whose owners had given notice of their willingness to carry oysters for the company pursuant to the order of the 12th, directs that those boats shall be employed, and that none others be allowed to take a turn with them until after the 31st of October. To make the original order valid, the consequences of a non-compliance with it should have been pointed out therein. The charter of the company is not before the court; and the act of parliament gives them no new power in this respect. And the evidence shews that the practice has been, to exclude a party having a proper boat from one turn by reason of absence, and not for three months, as is done by this order. Neither had the water-courts power to make such an order; for, though they might regulate the business, they had no power to restrain the rights of the freemen: Comyns's Digest, *Bye-Law* (B. 2.), (C. 4.). [*Jervis*, C. J. It was important that the foreman and jury should know who intended to carry the produce of the fishery to market. *Maule*, J. You say that this order would have been bad, if made by a water-court; and, further, that the foreman and jury at all events had no power to

make it?] Precisely so. In *Gosling v. Veley*, 7 Q. B. 406, 451, Lord Denman thus defines a bye-law: "A bye-law, though made by and applicable to a particular body, is still a law, and differs in its nature from a provision made on or limited to particular occasions: it is a rule made prospectively, and to be applied whenever the circumstances arise for which it is intended to provide." [*Maule, J.* The water-court may make an order regulating the carrying. May they not also repeal it?] Perhaps they may: but the question is whether they can affix a penalty which amounts to a forfeiture. In the Whitstable case,—*Adley v. Reeve*, 2 M. & Selw. 53,—it was held that a bye-law made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the Kentish shore than the oyster-ground of the company, under a penalty of 10*l.*, and, in case of refusal to pay the same, that such freeman shall thenceforth and until the fine be paid be *excluded from all share of the profits to be made thereafter by the joint trade of the company*, is a void bye-law, there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, *with fines and penalties for the breach of such orders*, and for prohibiting the freemen from being engaged in other oyster-grounds, under penalties *to be stopped out of the money arising by the sale of the stint of oysters of such freemen*. And Lord Ellenborough said: "A bye-law giving a remedy by distress for the recovery of the penalty, would be bad. And, is not this worse? The company are not content with levying the fine, but they withhold all share of the profits till the fine is paid. Is not that going vastly beyond the power of merely imposing a penalty for contumacy, with a direction to stop it out of the profits? And

1854.

HILLS
v.
HUNT.

1854.

HILLS

v.

HUNT.

there is not any instance stated which goes beyond that extent. Assuming, therefore, this bye-law in other parts of it to be good on general principles, and in conformity with the policy of the original constitution of the company,—and I believe it is not an unfrequent bye-law, that members of one company shall not be members of different companies,—is not this a penalty upon a penalty? I think there is a great deal in the argument that the inchoate rights of persons acceding to the body are to be taken as subject to the laws to be made for the regulation of the body; but, if there be not any usage to authorise the exclusion of the freemen from all share of the profits until the penalties be paid, it seems to me that this bye-law goes too far in that part of it: it is exercising a power beyond that given by law.” [Maule, J. That case has not much application. A penalty is the imposition upon a man of the payment of a sum of money, or some personal suffering.] In Grant on Corporations, p. 84, the rule is thus stated,—“With respect to the mode of enforcing bye-laws by corporations, it has already been observed that the power of enforcing by penalties is part of the power of making bye-laws, which is incidental to all corporations, to the developement of the objects of whose constitution such power is necessary; and in general the rule is, that a bye-law without an express act of parliament, can *only* be enforced by a pecuniary penalty, which must be certain.” (a) [Jervis, C. J. Is it not begging the question to call this a *penalty* ?] It is an *ex post facto* punishment upon the plaintiff, by excluding him from the more remunerative employment of conveying oysters to London. The defendant’s own evidence shews that the antient and customary power of the foreman and jury, was, to make

(a) Citing *Gee v. Wilden*, 2 Lutw. 1320, *Bosworth v. Bryden*, 7 Mod. 459, 2 Stra. 1112, and *Leathley v. Webster*, Sayer, 251.

the absent party stand by for one turn, not to exclude him in the manner here insisted upon. In *The King v. Tappenden*, 3 East, 186, a bye-law (in this same manor) altering the *qualification* of persons to be taken as apprentices by the members of a corporation, in order to acquire their freedom by servitude, was held not to be warranted by a custom in such body which claimed by prescription to make bye-laws regulating the *number* of persons to be taken apprentices,—the court saying that the bye-law was bad, as being a restriction of the qualification under the custom. Upon these grounds, it is submitted that the pleas were not proved, and that the orders in question were invalid.

1854.

HILLS
v.
HUNT.

Baddeley (with whom was *Montagu Chambers*), contra. Independently of the defence set up by the fifth and sixth pleas, the evidence adduced on the part of the plaintiff fails to sustain his declaration. The plaintiff was bound to set forth the orders distinctly and clearly according to their legal effect; and, if there were anything to qualify them, he was bound to set forth the qualification, and to shew that he was not affected by it. This he has not done. The declaration alleges that it is, amongst other things, by the orders and regulations of the company provided that all such freemen or members as should have boats should work for the company, in regular turns, *unless that he or his boat should be incapable of doing the business*, that is to say, each man, being so capable, should succeed him who worked last as he should stand in the company's list,—alleging as the only qualification of the custom, the fact of the boat or its owner being insufficient or incapable. It is somewhat remarkable, that, considering the extensive powers of the foreman and jury, confirmed as they are by the act of parliament, the declaration entirely ignores their existence. [*Jervis*, C. J. The objection you are now

1854.

HILLS

v.

HUNT.

urging is in the nature of a variance. Ought it not to have been taken at the trial? It is somewhat like the old case of a declaration against a non-freeman for trading, omitting to state a qualification of the custom, which enables the widows of freemen to trade.] Upon this special case, the court must deal with the whole record, and with the facts as stated: and it is immaterial whether a particular point was raised at the trial or not. Upon the second issue, the plaintiff was bound to prove the orders and regulations upon which he has declared. In this he has failed. He ought to have introduced the qualification in the order of the 29th of July, 1797, of the powers of the foreman and jury, with reference to the provisions contained in the order of the 31st of July, 1790. The order of the 29th of July, 1797, recites that of the 31st of July, 1790, and qualifies it thus,—“that nothing in the said recited orders contained was meant or intended to deprive or hinder, or shall deprive or hinder, the foreman and jury of this company, or the major part of them assembled on the company’s affairs, from exercising at all times their antient and accustomed discretionary powers of regulating the business of the said company, by postponing or setting aside the turn of any of the tenants of this manor and hundred in doing any business of the said company, for reasons appearing to the said foreman and jury, or the major part of them, to be satisfactory, expedient, or proper for that purpose.” Here is an order and regulation of the company, made at a water-court, with reference to those very things the infringement of which the plaintiff makes the subject of his declaration. The order of 1797 applies a principle of interpretation to the order of 1790: it introduces a new element for the consideration of the court. The declaration should either have set out the orders in *hæc verba*, or should have stated them strictly according to their legal effect, with any exception or proviso which

qualifies the party's rights or liabilities under them. The rule is well laid down in 1 Chitty on Pleading, 7th edit. pp. 312, 317, and also in the case of *Griffin v. Blandford*, Cowp. 62, and *Vavasour v. Ormerod*, 6 B. & C. 430, 9 D. & R. 597. In the first of these cases, the defendant (in replevin) avowed the taking under an antient custom that time out of mind the lord of the manor, upon the death and alienation of every tenant, was entitled to the second best beast; if but one, then to that one beast; and, if no beast, then to a compensation in lieu thereof. The custom was proved, but with an exception of mesne seignories, burgage tenures, and alienations to the use of the alienees and their heirs: and it was held, that the custom was not set out as proved, there being nothing in the plea which went to shew that burgage tenures and mesne seignories were excluded. And in *Vavasour v. Ormerod*, Lord Tenterden says: "If an act of parliament or a private instrument contain in it, first a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But, if the exception itself be incorporated in the general clause, there the party relying upon it must in pleading state it with the exception; and, if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance. This is a middle case. Here, the exception is not in express terms introduced into the reservation, but by reference only to some subsequent matters in the instrument. The words are, 'except as hereinafter mentioned.' And the clause *thereinafter mentioned* must be considered as an exception in the general clause, by which the rent is reserved: and then, according to the

1854.

HILLS
v.
HUNT.

1854.

 HILLS
 v.
 HUNT.

rule above laid down, the plaintiff ought in his declaration to have stated the reservation and the exception. Not having done so, I am of opinion that the variance is fatal." So, here, the plaintiff ought to have set out the order which qualifies that on which he relies.

Then, the plaintiff has, by the form in which he has alleged the orders, given them a drift and application which are inconsistent with the right of action upon which his claim is founded. He has chosen to confine the orders as to turns to a particular department of the trade, viz. the dredging and catching oysters; and then he goes on to allege an exclusion from his turn for dredging and catching oysters: but the evidence proved nothing of the kind. [*Jervis*, C. J. There is no question saved for us upon not guilty; and the second plea does not raise this point.] The *third* plea does. [*Cresswell*, J. There is no question presented for our decision upon the third plea.] That difficulty may be obviated by an amendment. [*Jervis*, C. J. The points are presented for our opinion by consent of the parties. They are bound by what they have consented to. This point is not open to the defendant.]

Then, as to the orders of the 12th and 19th of July, 1852, upon which the defendant relies in his fifth and sixth pleas. Upon these the case presents but little difficulty. That the foreman and jury have a right to make orders for the regulation of the trade of the company, is clear. This power is expressly recognised by the statute 3 Vict. c. lix. That statute, in s. 1, recites that "there is and hath been time out of mind a considerable oyster-fishery in the manor and hundred of Faversham, in the county of Kent, and the arms of the sea near thereunto, situate &c.; that there is, and from time out of mind hath been, a certain company, in the nature of a prescriptive corporation, called or known by the name of 'The Company or Fraternity of Free

Fishermen and Dredgers of the Manor and Hundred of Faversham, in the county of Kent,' and the freemen or members of the said company have bred, laid, dredged for, caught, had, and taken oysters and oyster-brood in the waters and creeks within the said fishery, exclusive of all other persons, the said company paying in consideration thereof a yearly sum of 23*s.* 4*d.* to the lord of the said manor and hundred of Faversham for the time being; that certain courts called water-courts of the said manor and hundred have time out of mind been held before the steward of the said manor and hundred, on Saturday next after Easter, and on Saturday next after Lammas Day, in every year, at which courts the members, or the majority of the members, of the said company or fraternity then present have made orders, rules, and regulations for the government and management of the said company, and for imposing and levying fines and penalties on the members of the said company for the breach or non-observance of such orders, rules, and regulations; and at a court holden on Saturday next after Easter, or in pursuance of orders then made, persons qualified according to the usages and customs of the said company have been heretofore admitted to the freedom of the said company: and that the said fishery is maintained and preserved at a very considerable yearly sum of money by the said company, and the said fishery is of great benefit to the public as well as to the said company; and it is expedient that further power should be granted to the said company, to maintain and preserve the same, than they now possess, and that the time for holding the water-courts for the said manor and hundred should be altered; and it is desirable that further powers should be granted to the said company; but the several purposes aforesaid cannot be effected without the aid and authority of parliament." It then goes on to enact "that the

1854.

HILLS
v.
HUNT.

1854.

HILLS
v.
HUNT.

several persons at present composing 'The Company or Fraternity of Free Fishermen and Dredgermen of the Manor and Hundred of Faversham, in the County of Kent,' and all other persons who shall hereafter be free of the said fishery, shall and may have and exercise all the powers and authorities now vested in and belonging to and now used and exercised by the said company, and also shall have and exercise all such other powers and authorities as are hereinafter given or mentioned." The 2nd section provides for the holding of general annual courts, and the election of a foreman, treasurer, secretary, and twelve jurymen, and that such foreman, treasurer, secretary, and jury for the time being shall have the management and regulation of the said fishery, and of the affairs of the said company, in the same manner, and to the same extent, as the foreman, treasurer, bookkeeper, and jury of the said company had theretofore had the management and regulation thereof. The only question is, whether the orders made by the foreman and jury on the 12th and 19th of July, 1852, were in excess of their power. It is submitted that they were not, and moreover that they were fair and reasonable. It was clearly reasonable to require notice from freemen having boats, of their readiness to be employed in carrying the produce of the fishery to market; and, if the foreman and jury might lawfully suspend for one turn those who neglected to give notice, they might suspend them for a longer period. *Primâ facie* they were acting within the scope of their authority and jurisdiction, and therefore the maxim "*Omnia præsumuntur legitimè facta, donec probetur in contrariam*" applies; and the rule is the same whether the act done is the act of a court or of a corporation. Many reasons might readily be suggested why a regulation of this sort should be reasonable in this particular trade. The competition is great, and the season limited. It is essential that the company should

be provided with boats sufficient for the conveyance of the oysters to market: and this cannot be done on the instant. The exclusion from a turn, for default of notice, is not in the nature of a penalty; nor is it like the case of the exclusion of a commoner from the exercise of his commonable rights: it is a mere regulation for the benefit of the general body. In *Bosworth v. Hearne*, 2 Stra. 1085, a bye-law that no drayman or brewer's servant should be abroad in the streets of London with his dray or cart after one o'clock in the afternoon, under the penalty of 20s., was held good, inasmuch as "it was only a regulation of trade, of which the city was the best judge; and it was enough that it did not appear unreasonable in itself." It is said that this practice of requiring notice from the owners of boats was not in force until 1850. But that circumstance in itself will not make it unreasonable. Nor is it a ground of objection that the order was not made at a water-court, which since the passing of the 3 Vict. c. lix, is held (unless called for special purposes) only once a year; for, it was competent to the water-court to delegate the power to make it to the foreman and jury: *Rex v. Spencer*, 3 Burr. 1827. This order is not a *restraint* of trade, as in the instances put by Lord Macclesfield in *Mitchell v. Reynolds*, 1 P. Wms. 181, but a mere *regulation*; and bye-laws for the regulation of trade, which are for the benefit and advantage of trade, are good: *The Master Gunmakers of London v. Fell*, Willes, 384. The common council of the city of London have by custom a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they shall be licensed. A bye-law was made in common council, that four hundred and twenty of such carts, and no more, should, by the president and governors of Christ's Hospital, be allowed or licensed to work for

1854.

HILLS

v.
HUNT.

1854.

 HILLS
 v.
 HUNT.

hire within the city. It was held, that such bye-law was supported by the custom ; and that the discretionary power of licensing was rightly and *ex necessitate* delegated by the common-council to a smaller body ; and (on a motion for a *procedendo*, after return to a *habeas corpus* obtained by a party sued on the bye-law) the court of Queen's Bench refused to inquire whether or not the number of four hundred and twenty was reasonable. [*Maule, J.* Surely a competent authority in a trading corporation may make regulations in restraint of their trade.] In *James v. Tutney*, Cro. Car. 497, it was held that a custom in a manor to make bye-laws for the regulation of a common or great waste, parcel of the manor, is good : so, a bye-law, that no commoner shall put his sheep into a particular part of the common, is good. It is objected that the order of the 12th of July, 1852, does not intimate at what time the notice was to be given. But these orders, which are made by men comparatively illiterate, are not to be construed with the strictness that would be applied to an act of parliament or a deed : or, as Denison, J., says, in the case of *The Master &c. of the Vintners' Company v. Passey*, 1 Burr. 235, 239, "Bye-Laws ought to have a *reasonable* construction : we ought not to construe them so strictly as to take them to be void, if *every particular reason* of making them does not appear." And here it appears on the face of the case, that the plaintiff had notice of the order on the 14th ; and it further appears that he himself was excluded in 1851, by the same rule. [*Maule, J.* The order of the 12th of July was not the notice. I observe the plaintiff in his evidence says, "I heard there was a notice. I heard of it on the 14th of July. *It did not mention any particular time.* I thought it time enough to give notice, when I was ready to carry."] He had the means of knowing the time : the same time that applied to the salesmen, must neces-

sarily apply to those who were to carry the oysters to market. At all events, the allegation of the order of the 19th of July, is sufficient to sustain the defence, striking out all the rest. If there be any ground at all upon which these orders can be sustained, the court will uphold them. It is most essential to the welfare and prosperity of the trade, that the authority of the foreman and jury should not be impugned.

1854.

HILLS
v.
HUNT.

Quain, in reply, was stopped by the court.

JERVIS, C. J. I am sorry to say that we must determine this case without deciding the principal point which the parties intended to raise, viz. whether or not the foreman and jury had power to make the order of the 19th of July, 1852, and whether or not such order was reasonable. Upon the declaration, one only objection is open: and that is, that the plaintiff has alleged his right as a freeman of the company to be employed in his turn to carry oysters to Billingsgate generally. Mr. Baddeley says, that, inasmuch as the water-court order of the 29th of July, 1797, makes that right subject to a qualification or condition that the party and his boat should be capable of doing the business, it does not confer a general right to be employed, and that the restriction should have been stated in the declaration. It is unnecessary to quarrel with the general rule as contended for by the defendant's counsel. But I am of opinion that it has no application to this case, because this is not a restriction or limitation of that description. The right to be employed in carrying oysters in turn is absolute, until something is afterwards done by the foreman and jury to prevent the party from taking the benefit of it: the alleged condition is not of a nature to qualify or cut down the right. Then comes the only remaining question,—whether the defendant

1854.

HILLS
v.
HUNT.

has proved his fifth and sixth pleas, which are substantially the same. Several objections were urged, one of which, though a technical objection, appears to me to be fatal. The plea alleges, that, on the 12th of July, 1852, the same being a fit and convenient time for that purpose, the foreman and jury for the time being, having then the management and regulation of the fishery, and of the affairs of the company, as in the act of parliament in that behalf mentioned, in order that the company might be provided with fit and proper vessels to take their oysters to market at such period or season of the year as aforesaid, and that the trade and business of the company might then be properly and adequately conducted and carried on, caused a certain notice and order to be duly given and made to the freemen and members of the company,—the said notice and order being proper and reasonable in that behalf, and being a notice or order of such and the like nature as the foreman and jury of the said company for the time being had before the passing of the act been authorised and impowered from time to time to give and make in the management and regulation of the said fishery, and of the affairs of the said company,—and thereby directed and required that those freemen or members of the company who had vessels fitting and proper for the purposes aforesaid, and intended to work for the said company at the period or season of the year for dredging for, catching, and taking oysters, should, *on or before the 19th of July in the year aforesaid*, give notice to the foreman or to any one of the jury of the said company of their intention of working for the company as aforesaid,—of which said notice and order the plaintiff afterwards, and before the said 19th of July, had notice; and that the plaintiff neglected and omitted to give such notice of his intention of working for the company as aforesaid. The plea then goes on to allege, that, after-

wards, on the 19th of July, by a certain other order and regulation made by the foreman and jury,—the same being a proper and reasonable order and regulation in that behalf, and being an order and regulation of such and the like nature as the foreman and jury for the time being had before the passing of the act been authorised and empowered from time to time to make in the management and regulation of the fishery, and of the affairs of the company,—it was ordered and provided that the boats or vessels of those of the freemen or members of the company who had given notice of their intention of working for the company, should be employed to work for the company, and to carry their oysters to Billingsgate, and that no other boats or vessels should be allowed to take turn with them, or be employed in so working and carrying the oysters as aforesaid, with the said boats or vessels of the freemen or members who had given notice, until after the 31st of October; and that, by reason of the premises, and by virtue of the last-mentioned order and regulation, the defendant, according to his duty in that behalf as foreman of the company, at the several times in the declaration mentioned, being after the 19th of July, and before the 31st of October, refused to employ the plaintiff and his boat, as he lawfully might, the plaintiff and his boat not being then entitled, by reason of the premises, to be so employed as aforesaid. There is no evidence on the face of the special case, of any such notice or order having been given or made at all. It is true a notice was given, requiring those freemen who had vessels fitting to give notice to the foreman or one of the jury, of their intention of working for the company,—but not fixing any time at which such notice should be given. It appears from the case, that, prior to the year 1850, the practice had been, that the foreman and jury ascertained, either by notice or by personal application, before the commencement of

1854.

HILLS
v.
HUNT.

1854.

HILLS
v.
HUNT.

the season, who could carry; and then the freemen, after they had ceased to be employed elsewhere, gave notice, and came in after standing by one turn: and there is nothing to shew that the old practice had not been revived. Mr. Baddeley says the pleas were sufficient without the allegation of notice. But, if that were struck out, it would appear that the foreman and jury chose to employ others in the plaintiff's turn, without any notice to him. That clearly would not be reasonable. I think the whole basis of the plea fails; and, on that simple ground, I am of opinion that the plaintiff is entitled to judgment.

MAULE, J. I am of the same opinion upon both points, and I do not think it necessary to add anything to what my Lord Chief Justice has said. The allegations of notice in the fifth and sixth pleas clearly are not proved; and, if the matters not proved be struck out, as it has been suggested they may be, the pleas would afford no answer whatever to the declaration.

CRESSWELL, J. I am entirely of the same opinion.

CROWDER, J. The fifth and sixth pleas are entirely founded upon the notice. And I agree with the rest of the court in thinking that they cannot be made good by striking out any part.

Judgment for the plaintiff.

1854.

GETHER v. CAPPER.

May 31.

THIS was an action for freight upon a charterparty. The first count of the declaration stated, that, on the 25th of June, 1853, by a certain charterparty then made between the plaintiff and certain persons therein described as Messrs. Hoare, Buxton, & Co., of London, it was agreed, that, after having performed the voyage from Galle to Honfleur, the plaintiff should proceed from thence to Sundswall, and there on account of the charterers should take on board a cargo of wood, with the necessary deck-load and stowage, as much as the vessel could conveniently carry, and should then without delay proceed to Southampton, where the cargo was to be discharged according to the bill of lading, and the voyage was to conclude: That it was further agreed, that, upon delivering the same at the said place of discharge, the plaintiff was to receive *the highest freight which he could prove to have been paid for ships on the same voyage when the said vessel passed Elsinore*, but not less than 90*s.* British sterling, per St. Petersburg standard hundred, computed at one hundred and sixty-five British cubic feet for planks, battens, and boards, and one hundred and fifty cubic feet for timber, and full freight for the deck-load, and for short lengths for stowage, all with 5 per cent. hat-money,—which freight was to be paid to the plaintiff, after a right delivery of the cargo, half in cash, and half in four months' bills on London, to be approved of by him: That it was further agreed that the necessary moneys for ship's disbursements at the place of lading might be received from the skipper against insurance, and in reduction of freight: That

By a charterparty for a voyage from Sundswall to Southampton, it was stipulated that the owner should receive "the highest freight which *he could prove* to have been paid for ships on the same voyage when the vessel passed Elsinore, but not less than 90*s.* per St. Petersburg standard hundred;"—Held, that this did not contemplate strictly legal proof; but that the owner would be entitled to the highest rate of freight which the owner, to the knowledge of the freighter, was in a position to prove, by reasonable evidence, to have been paid.

1854. the cargo was to be delivered free to and from the ship's side at all places ; and, should lighters be required, they should be for account of the freighter ; and that the freighter was to clear the cargo in all ports and rivers : That the said freighters assigned to the defendant, and the defendant then became and was the assignee of, the said cargo, and entitled to receive the same : And that thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, would deliver unto the defendant as such assignee the said cargo according to the said charterparty, the defendant then promised the plaintiff to perform and fulfil all things in the said charterparty contained on behalf of the freighters to be performed : That all times had elapsed, and all things had been done by the plaintiff necessary to entitle him to the fulfilment of the said promise on behalf of the defendant, and to payment according to the terms of the said charterparty : That *the plaintiff was able to prove, and that the fact was, that the highest freight paid for ships on the same voyage at the time the said vessel passed Elsinore, was, to wit, 7l. 7s. 6d. per St. Petersburg standard hundred,—of which the defendant always had notice : That, by reason of the premises, a large sum, to wit, the sum of 800l., became due and payable to the plaintiff for the freight of the said vessel, and for percentage thereon, and for port-dues, and otherwise, according to the terms of the said charterparty : And that, although a certain sum, to wit, the sum of 167l. 3s. 5d., had been paid in part liquidation of the said larger sum : Yet that the defendant had not paid the residue according to the terms of the said charterparty, and had wholly refused either to give such bills as in the said charterparty was mentioned, or to pay in cash the said freight and charges, or any part thereof.*

Mutual promises.

General allegation of performance.

Special allegation.

Breach.

And the plaintiff also sued the defendant for money payable by the defendant to the plaintiff for freight for

the conveyance by the plaintiff for the defendant at his request, of goods in ships: and for money paid by the plaintiff for the defendant at his request; and for money found to be due from the defendant to the plaintiff upon an account stated between them: And the plaintiff claimed 1000*l*.

1854.

 GETHER
v.
CAPPER.

The defendant pleaded,—first, to so much of the first count as claimed freight exceeding 90*s*. British sterling per St. Petersburg standard hundred, computed as aforesaid, with 5*l*. per cent. hat-money, that the plaintiff *was not able to prove*, nor was it the fact, that the highest freight paid for ships on the same voyage at the time the said vessel passed Elsinore, exceeded such 90*s*., with such 5*l*. per cent. hat-money,—secondly, to the cause of action in the introductory part of the first plea mentioned, that the plaintiff *did not prove* that any higher rate of freight than such 90*s*. as aforesaid, with such 5 per cent. hat-money as aforesaid, had been paid for ships on the same voyage when the said vessel passed Elsinore, according to the true meaning of the contract.

First plea.

Second plea.

The plaintiff demurred to the second plea,—the point marked in the margin being, “that the plea puts in issue an immaterial fact, and one which is not alleged in the count to which it is an answer; and generally, that it discloses no sufficient ground of defence to the action.”

Demurrer to
second plea.

Lush, in support of the demurrer. The second plea is clearly a bad one. It admits that a higher rate of freight than 90*s*. had been paid for ships on the same voyage when the vessel in question passed Elsinore, and that the plaintiff was able to prove it: all it denies, is, a fact not alleged in the declaration, viz. that the plaintiff *proved* it. This is a mercantile contract, which must receive a reasonable construction. The construction which will be contended for on the other side,—that, before the plaintiff can be entitled to receive the higher

1854.

 GETHER
 v.
 CAPPER.

freight, he must give strict legal proof of its payment,—would be unreasonable and absurd. Before whom is he to prove it? Is he to bring an action, and so prove it before a court and jury? [*Crowder, J.* The defendant will say it means such proof as ought reasonably to be deemed sufficient to satisfy a merchant.] That might be a very convenient admission for the purposes of this demurrer: but that can hardly be contended. [*Maule, J.* If this plea be good, the declaration must be bad. If proving the highest amount of freight paid for ships on the same voyage when this vessel passed Elsinore, was a condition-precedent, the general allegation that all things had been done by the plaintiff necessary to entitle him to the fulfilment of the defendant's promise, and to payment according to the terms of the charterparty, does comprehend the allegation that he did prove that fact.] The meaning of that general allegation is, that the plaintiff brought home the cargo, and so earned freight under the charterparty. The declaration then goes on to allege circumstances which entitle the plaintiff to the larger freight claimed. That which the plea traverses is nowhere alleged at all.

Raymond (with whom was *Bovill*) contra. The plea in question is not addressed to the 90s. freight, but to the higher rate of 7l. 7s. 6d. per St. Petersburg standard hundred. It lay on the plaintiff to shew that he was entitled to receive that higher amount of freight. The *proof* mentioned in the charterparty clearly is a condition-precedent to the plaintiff's right to receive that: and, if it be a condition-precedent, he cannot say that it is not involved in the declaration; for, if not, the declaration would be bad. The general averment that the plaintiff had done all things necessary to entitle him to the fulfilment of the defendant's promise, and to payment according to the terms of the charterparty, must

mean that he has entitled himself to the whole of that which he demands. [*Maule, J.* The allegation of performance comes immediately after the mutual promises, and before the allegation as to the larger freight. That general allegation of performance would be proved if the plaintiff was entitled to be paid anything in respect of the contract.] The demand is for the whole freight due on the charterparty. The plaintiff avers that the whole freight is more than 90*s.*, to wit, 7*l.* 7*s.* 6*d.* [*Maule, J.* The plaintiff does not aver that he has done everything to entitle him to recover the freight claimed in the declaration; but, to the fulfilment of the contract, and to the payment of the freight mentioned in the charterparty. He will be entitled to that, in the event of his being found entitled to the minimum freight only.] He is by this action insisting upon the chartered freight being a sum exceeding 90*s.* Before the Common Law Procedure Act, to entitle him to the higher freight, the plaintiff must distinctly have averred all the facts necessary to shew that the contract entitled him to it. [*Maule, J.* It was competent to the plaintiff to sue for the minimum freight only: and the declaration may be a very good one, although it states something bearing upon the claim to the larger freight. In effect, the declaration states, that the defendant promised to pay freight,—a certain minimum freight in one event, and a certain larger freight in another event,—and that something has happened which entitles the plaintiff to recover *some* freight. That which the plaintiff wanted to shew, was, that the events which happened entitled him to recover all the freight he claims in his declaration: instead of saying that, he says, that he has done all that entitles him, and that the events which have happened entitle him, to all that the contract entitles him to.] The plea is a substantial answer to so much of the demand as it is addressed to. The main

1854.

 GETHER
 v.
 CAPPER.

1854.

 GETHER
 v.
 CAPPER.

question is, whether actual proof was a condition-precedent to the plaintiff's right to sue for the higher freight. This is a mercantile contract, which should receive such a reasonable construction as to make it capable of performance without the intervention of a suit at law: *legal* proof could not have been contemplated. If the words are so ambiguous as to be incapable of any construction, the plaintiff can only be entitled to the minimum freight. "Proof" does not necessarily mean *legal* proof. It was not necessary to prove absolutely that the higher rate of freight had been paid in other cases: this might have been done by producing a charterparty or a bill of lading, or by any other reasonable medium of proof. It would be for the jury to say whether or not reasonable proof was tendered. It is like the case of a contract for an "approved bill." [Maule, J. I think it is extremely doubtful whether the declaration does not in fact allege that the plaintiff did prove the fact: it alleges that the defendant knew the fact, and that the defendant was aware that the plaintiff was able to prove it.] If so, the plea is good as a traverse. His mere knowledge might not be enough. [Maule, J. The charterparty does not explicitly require proof to be given: it is only by inference you require it. Is not a thing *proved* to one who *knows the fact*?] The court assumes that the defendant knew it. [Maule, J. The declaration so alleges, and the plea does not deny it. The correct view of it seems to me to be this. The words are,—the plaintiff to receive the highest freight which he can prove to have been paid for ships on the same voyage when the said vessel passes Elsinore, but not less than 90s. That involves the fact that the larger freight has been paid. The charterparty does not say that the plaintiff *shall* prove it: but you assume that by implication it *does* require him to prove it. To that I do not assent. Admitting

the simple fact of ability to prove not to be enough, in the circumstances which have happened,—that the fact was so, that the plaintiff was able to prove it, and that the defendant knew it,—is not the charterparty satisfied? The plaintiff shall prove, or such circumstances shall concur as to render proof unnecessary. The declaration does not aver that the plaintiff *did* prove the fact, but that he *could* prove it. The capacity to prove, coupled with knowledge on the part of the defendant of the capacity to prove, and of the existence of the fact, I think satisfies the terms of this charterparty. If the words had been “which he *can* prove and *does* prove,” it might have been otherwise; for, in that case, perhaps it could not have been said that something which is not proof shall be equivalent to proof.] Taking the whole contract together, it evidently shews that something more was meant than mere knowledge. [*Maule, J.* The case is somewhat analogous to *Warren v. Peabody*, ante, Vol. VIII, p. 800.]

1854.

 GETHER
v.
CAPPER.

JERVIS, C. J. I think, for the reasons given by my Brother Maule, that the plaintiff is entitled to judgment on this demurrer.

The rest of the court concurring,

Judgment for the plaintiff. (a)

(a) The plea demurred to had been disallowed by Cresswell, J., at Chambers, but restored by the court, on motion, upon condition, that, if the plaintiff demurred to it, the demurrer should be set down and argued without delay.

1854.

June 8.

CHARLES and Another v. ALTIN.

To constitute a good plea in avoidance of circuity of action, it must shew that the sum which the defendant is entitled to recover from the plaintiff is necessarily the same as that in respect of which the plaintiff is suing.

By a charter-party it was agreed between the master and the charterers, that one third of the stipulated freight

should be paid before the sailing of the vessel,—*the same to be returned, if the cargo was not delivered at the port of destination,—the charterers to insure the amount at the owners' expense, and deduct the cost of doing so from the first payment of freight.* The charterers paid the one third freight, deducting the premium of insurance. The vessel and cargo did not reach their port of destination. In an action by the charterers to recover back the freight so paid,—the owner pleaded that the loss of the part of the freight to be returned, was such a loss as was by the charterparty to be insured against by the charterers at the owners' expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that, although the plaintiffs might with the use of reasonable care and diligence have effected an insurance whereby the defendant and the owners of the ship would have been fully indemnified against the loss of the one third freight so to be returned, the plaintiffs effected the insurance so negligently and out of the usual course of business, that the same became of no use or value, and the defendant by reason of such improper conduct had sustained damages to the amount of the said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to the defendant such amount as he should have to return to the plaintiffs under their charterparty, and any sum paid or returned by the defendant to the plaintiffs in respect of the freight, would be the damages sustained by the defendant by reason of such improper conduct and deviation, and the defendant would be damnified to that extent:—

Held (dubitante *Crowder, J.*), that the plea was bad, inasmuch as the conclusion it drew was not warranted by the facts stated, for, that the liability of the plaintiffs in respect of their negligence in effecting the insurance, was a liability to *damages*, which were not necessarily identical in amount with the claim set up by them in this action.

THIS was an action upon a charterparty. The declaration stated, that, on the 3rd of July, 1852, it was by charterparty mutually agreed between the defendant, master of the good ship or vessel called the *Swea*, and the plaintiffs, that, the said vessel, being tight, staunch, and strong, and every way fitted for the voyage, should, with all possible dispatch, proceed direct to Hartlepool, and there load from the agents of the plaintiffs a full and complete cargo of coals, which the plaintiffs bound themselves to ship, not exceeding what the said ship could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, should therewith proceed to Point-de-Galle, Ceylon, or

so near thereto as she might safely get, and deliver the same there alongside any craft, steamer, floating-depôt, or pier, as might be directed by the plaintiffs' agents, to whom the said vessel was to be consigned at the port of discharge: and it was thereby further agreed that the freight should be paid at and after the rate of 26*l.* per keel of 21 tons, 4 cwt., on the quantity delivered, in full (the act of God, the Queen's enemies, fire, restraint of princes, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, during the said voyage, always excepted), and it was thereby further mutually agreed that the freight should be paid, one third by bill at three months from the final sailing of the vessel from her last port in Great Britain, or in cash under discount,—the same to be returned if the cargo was not delivered at the port of destination,—the charterers to insure the amount at owners' expense, and deduct the costs of doing so from the first payment of freight; and the remainder by bill at three months' date from the delivery of a certificate to the charterers, signed by the consignees, of the right and true delivery of the whole cargo agreeably to bills of lading, less cost of coals short delivered, or in cash under discount at 5*l.* per cent. per annum, at charterers' option: Averment, that the said vessel did proceed to Hartlepool, and there load a full and complete cargo of coals, and did therewith proceed on her said voyage, and the plaintiffs paid to the defendant one third of the said freight, after deducting the cost of insuring, by bill for 166*l.* 11*s.* 11*d.* at three months from the final sailing of the said vessel from her last port in Great Britain (which said bill was afterwards, and before action brought, duly paid), and 12*l.* 19*s.* 2*d.* by cheque, under discount, according to the terms of the said charterparty: That the said cargo never was delivered at its port of destination: And that, although the plaintiffs had done every

1854.

CHARLES

v.

ALTIN.

1854.

CHARLES
v.
ALTIN.

thing on their part to entitle them to have the amount so paid by the plaintiffs in respect of freight returned and repaid, according to the terms of the said charterparty; and although a reasonable time in that behalf had long since elapsed; yet the defendant had not returned to the plaintiffs the amount so paid in respect of freight as aforesaid, contrary to the terms of the said charterparty.

There was also a count for money payable by the defendant for money received by the defendant for the use of the plaintiffs, and for money paid by the plaintiffs for the defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them: And the plaintiffs claimed 300*l*.

Second plea.

Second plea,—as to the first count,—that the said cargo was not delivered at the port of destination, by reason of the dangers and accidents of sea happening to the said ship in the course of her voyage in the said charterparty mentioned, and before the completion, whereby the said ship was wrecked and wholly lost during the said voyage, to wit, at the Cape of Good Hope, and before her arrival at the said port of destination; and the delivery of the said cargo was entirely prevented, and the freight payable in respect thereof, including the said part so to be returned as in the declaration mentioned, was wholly lost: and the said loss of the said part of the freight to be returned as aforesaid was such a loss as was by the provisions of the said charterparty to be insured against by the plaintiffs at the owners' expense; and the insurance by the said charterparty required would, if the same had been effected according to the form and effect, true intent, and meaning of the said charterparty, have indemnified the defendant against the loss of the one third of the said freight which was to be returned by him in the event of the non-delivery of the said cargo at the port of destination: That, although

the plaintiffs charged the defendant with the costs of insuring one third of the freight, and deducted such costs from the amount of the one third of the freight so paid to the defendant as aforesaid ; and although they could and might, with the use of reasonable care and diligence, have effected a good and sufficient insurance, in the usual course of business, according to the true intent and meaning of the said charterparty, whereby the defendant and the owners of the ship would have been fully and sufficiently indemnified against the loss of the said one third of the freight so by him to be returned as aforesaid ; yet the plaintiffs did not take or use reasonable or ordinary care and diligence in insuring such one third of the freight, and did not insure the same in the usual course of business, but improperly deviated from the usual course of business in effecting such insurance, and effected the same in such a negligent, insufficient, and improper manner, and so out of the usual course of business, and with such improper and insufficient assurers or underwriters, that, by and through the negligent and improper conduct of the plaintiffs in effecting such insurance, and their improper deviation from the usual course of business, the said insurance became of no use or value, and the defendant, by reason of such improper conduct and deviation, had sustained damages to the amount of the said one third of the said freight so insured ; and the plaintiffs thereby, before the commencement of this suit, became liable to the defendant for the same,—being the amount in and by the said first count claimed by the plaintiffs to be repaid and returned to them by the defendant,—and liable to make good to the defendant such amount as he should have to return to the plaintiffs under the said charterparty ; and any and every sum of money paid or returned by the defendant to the plaintiffs in respect of the said freight, or recovered by the plaintiffs under the said first count, will be the damage sus-

1854.

CHARLES
v.
ALTIN.

1854.
CHARLES
v.
ALTIN.
Ninth plea.

tained by the defendant by reason of such improper conduct and deviation as aforesaid, and the defendant will thereby be damnified to that extent.

Ninth plea,—as to 185*l.* 3*s.* 9*d.*, parcel of the plaintiffs' claim as to the residue of the declaration, and other parcel than the sum of 89*l.* 10*s.* in the seventh plea excepted,—that the said sum of 185*l.* 3*s.* 9*d.* was the amount of one third of the freight in the first count mentioned which was by the terms of the charterparty therein mentioned to be returned by the defendant to the plaintiffs if the cargo of the vessel therein mentioned was not delivered at the port of destination; and the said sum of 185*l.* 3*s.* 9*d.*, parcel &c., was made up of the two sums of 166*l.* 11*s.* 11*d.* and 12*l.* 19*s.* 2*d.* in the said first count mentioned, and the costs of insuring, in that count also mentioned, being the further sum of 5*l.* 12*s.* 8*d.*; and the said sum of 185*l.* 3*s.* 9*d.* in the same sum sought to be recovered by the first count of the declaration as one third of the said freight: That the said sum of 185*l.* 3*s.* 9*d.* is not payable by the defendant to the plaintiffs otherwise than under the terms of the said charterparty in the first count mentioned, and as the one third part of the freight to be returned to the plaintiffs in case of the non-delivery of the cargo therein mentioned at the port of destination; and that the same, if recoverable at all, was recoverable under the said first count: That the said vessel in the said count mentioned was wrecked and lost, and the delivery of the cargo at the port of destination wholly prevented, in the manner in the second plea mentioned,—and which second plea the defendant averred to be entirely true,—and the plaintiffs thereupon claimed from the defendant the said sum of 185*l.* 3*s.* 9*d.* as money received by the defendant for the use of the plaintiffs, and as money paid by the plaintiffs for the use of the defendant at his request: That, before the commencement of this suit, the plaintiffs,

by reason of their negligent and improper conduct in insuring as in the said second plea mentioned, and their improper deviation from the usual course of business therein mentioned, had become and were, and still remained, liable to indemnify the defendant against paying or returning to the plaintiffs the said sum of 185*l.* 3*s.* 9*d.*, or any part thereof, and to make good to the defendant the loss sustained by such negligent and improper conduct and deviation,—such loss being the said sum of 185*l.* 3*s.* 9*d.* in the introductory part of that plea mentioned; and that any and every sum of money payable or returnable by the defendant to the plaintiffs in respect of the said freight, or recoverable by the plaintiffs under the said first count, would, if paid or returned to, or in any way recovered by the plaintiffs, be lost to the defendant, and would be the damage sustained by the defendant by reason of the said negligent and improper conduct and deviation of the plaintiffs.

1854.

 CHARLES
v.
ALTIN.

The plaintiffs demurred to these two pleas; the grounds of demurrer stated in the margin being,—as to the second plea, that it confessed but did not avoid the causes of action contained in the first count,—and, as to the ninth plea, that it confessed but did not avoid the cause of action contained in that part of the declaration to which it was pleaded. Demurrers.

Channell, Serjt., in support of the demurrer. (a) The

(a) The points marked for argument on the part of the plaintiffs, were,—

As to the demurrer to the second plea,—“that the second plea discloses nothing in bar of the action as set forth in the first count; that it admits the undertaking of the defendant to return the proportion of freight

paid in advance, in case the cargo were not delivered at the port of destination, and the fact that it was not so delivered, and that the amount so to be returned has not been paid, and sets up as an answer, that, by mere negligence of the plaintiffs, the defendant has lost the benefit of an insurance on the

1854.

 CHARLES
 v.
 ALTIM.

plaintiffs seek to recover, under the terms of the charter-party, the one third freight which they have paid to the master, the event having happened which was to entitle them to claim such return. The defendant sets up in answer that which at the utmost amounts to a claim for unliquidated damages, which properly forms the subject of a cross action. The authorities upon this subject are collected in *Turner v. Davies*, 1 Wms. Saund. 148, 150, n. (2); and they will generally be found to be cases where there were cross demands and obligations in the nature of *debts*. In *Carr v. Stephens*, 9 B. & C. 758, 4 M. & R. 590, a receiver of rents of an estate to a share of which a married woman was entitled, having in his hands money due to her, by the direction of the husband, accepted a bill on the faith of that fund, drawn by a creditor of the husband for money lent to him: before the bill became due, the husband and wife gave a joint direction to the receiver to pay over the money to a third person, which he did before the commencement of the action: when the bill became due, the acceptor refused to pay it, unless the drawer would indemnify him against the claim of the husband and wife to have the money paid according to their order: an indemnity was given, but the acceptor

freight; that this is a confession, without an avoidance; that the matter alleged in the second plea amounts at most to a substantive cause of action for unascertained damages; that the doctrine as to circuitry of action does not apply; and that there is no contract, express or implied, in the charter-party, on the part of the plaintiffs, to indemnify the defendant against negligence of the plaintiffs in insuring the freight:"

And, as to the demurrer to

the ninth plea,—“it will also be contended that the ninth plea is either an attempt to set off a claim for damages against an admitted debt, or a special and expanded plea of never indebted, which is not borne out by the facts alleged in the plea, and that, on the contrary, the facts stated shew that the defendant *was* indebted, and disclose nothing which excuses or exonerates him from the payment of such debt.”

still refused to pay; and it was held, that the drawer could not maintain an action on the bill, as it would only lead to a circuitry of action, as the acceptor, being bound to pay the money according to the order of the husband and wife, might recover it back by suing on the agreement to indemnify. At the trial, Lord Tenterden ruled that the plaintiff was entitled to recover, and that the defendant must resort to the indemnity for reimbursement: but, when the case came before the court, his Lordship said: "Upon further consideration, I think I was wrong in deciding that the plaintiff might recover on the bill, and that the defendant must resort to the indemnity; for, that would only lead to a circuitry of action. It appears, that, before the bill became due, Mr. and Mrs. H. ordered the defendant not to pay it with the money in his hands, and to which they were entitled. He was bound to comply with that order; and, if he afterwards was compelled to pay the plaintiff, he would be liable to pay the amount to Mr. and Mrs. H. over again, and entitled to sue on the indemnity. In order to avoid that circuitry of action, I am of opinion that we ought to hold that the present action is not maintainable." That was a clear case of set-off. *Connop v. Levy*, 11 Q. B. 769, was somewhat like *Carr v. Stephens*. That was an action of assumpsit by executors, the first count being for work and labour of the testator, money paid by him, and money due upon an account stated with him, with a promise to him; the second being for work and labour and money paid by the plaintiffs as executors, and on an account stated with them as executors, with a promise to them as executors. The defendant pleaded, that, the testator, in consideration of the defendant consenting to act on a provisional-committee for a projected railway, agreed to indemnify him from any charges on account of the railway; that the work was done and moneys paid by the plaintiffs in and about sur-

1854.

 CHARLES
v.
ALTIN.

1854.

 CHARLES
 v.
 ALTIM.

veying the line, and the account was stated by them in respect of the same work, &c.; that all the causes of action accrued after the promise to indemnify, and that the defendant made the promises only in his character of member of the committee; that the railway was abandoned, and the work and payments became of no value, and all sums recovered from the defendant in respect thereof would be lost to the defendant, and he would be damnified to that extent. Upon special demurrer, this was held a good plea, for avoiding circuity of action, to both counts,—since the defendant, on the facts alleged, was entitled to recover from the testator in his life, or from his representatives, as much as they would recover from him. That was the case of an express indemnity. [*Maule, J.* It was an indemnity against a pecuniary demand.] Which, when ascertained, would amount to a debt. [*Maule, J.* There the testator had entered into a contract which would be performed by the payment of a sum of money. Here the plaintiffs contracted to effect a policy of insurance; that is not a contract which can be performed by paying money. In *Allen v. Cameron*, 1 C. & M. 832, A. contracted, in consideration of 220*l.* 10*s.*, to sell and plant a quantity of trees on B.'s land, and also that "he should and would, at his own costs and charges, well and sufficiently keep in order the said trees aforesaid for two years after the planting, and that such as should die during that period (except from injury by sheep, game, or cattle) should be replaced by him:" in an action to recover the price,—it was held that evidence of non-performance by A. of any part of the contract on his part, was admissible in reduction of damages. (a) *Jervis, C. J.* If this had been an action to recover the balance of freight, and the defence set up had been that the contract had not been completely per-

(a) And see *Dawson v. Collis*, *antè*, Vol. X, p. 523.

formed, *Allen v. Cameron* would have been to the purpose.] The partial non-performance of the contract in that case was properly allowed in reduction of damages. Here, however, the claim set up by the defendants,—that the plaintiffs were guilty of negligence in effecting an insurance,—is quite independent of the contract for the breach of which the plaintiffs declare, *and sounds in damages*. The defendants' complaint involves several matters,—whether there was any such promise or duty as alleged, whether there was any consideration for the promise, whether the plaintiffs were guilty of the alleged breach of promise or duty, and what were the damages resulting from the alleged neglect. It may be that the underwriters were solvent or the ship unseaworthy. These, and many other considerations would be involved if the claim were presented by way of cross-action. [*Jervis*. C. J. Does not the plea by the averments preclude those defences which might be set up in a cross-action?] That must be conceded: nor can it be contended, that, so far as the language of the plea goes, it does not distinctly allege that the policy became ineffectual owing to the plaintiffs' negligence in deviating from the customary course: but the question is whether the law will give effect to such a plea. If there is any contract of indemnity at all, it is by way of implication only.

1854.

 CHARLES
v.
ALTIN.

Rew, *contra*. (a) The plea is good, not on the ground of set-off, but upon the doctrine of avoiding circuity of action; as is said by Lord Denman, in *Walmsley v.*

(a) The points marked for argument on the part of the defendant, were,—“That the second and ninth pleas sufficiently avoid the causes of action to which they are respectively pleaded; that the pleas shew

that the amounts claimed, if paid to the plaintiffs, would be recoverable back by the defendant; and that the defence set up in each case was maintainable, in order to avoid circuity of action.”

1854.

 CHARLES
 v.
 ALTIN.

Cooper, 11 Ad. & E. 216, 3 P. & D. 149,—“ A covenant not to sue has been held equivalent to a release, on no other principle than that of avoiding circuitry of action, i. e. the scandal and absurdity of allowing A. to recover against B. in one action, the identical sum which B. has a right to recover in another against A.” That is precisely what will happen in this case, if this plea be not held to be a defence. The sum recovered by the plaintiffs in this action, will be precisely the sum which the defendant would recover in a cross action. This is not, it is true, an express contract of indemnity. The cases in the notes to *Turner v. Davies*, are not confined to liquidated damages: one of the earliest was a case of *trespass* on one side and *covenant* on the other. [*Crowder*, J. Is there any case to shew that one who neglects to insure according to his contract, himself becomes an insurer?] None in our courts. [*Maule*, J. Suppose a man agrees to effect an insurance for another by a given day,—if he omits to do so, no doubt he is liable to be sued for damages.] In that case, if the ship were lost, the party would be liable to the full amount agreed to be insured. [*Maule*, J. But, suppose the merchant has notice of the broker’s failure to insure, in time to effect the insurance himself,—is he to lie by, and then claim a full indemnity from the broker?] This case is more like *Simpson v. Swan*, 3 Campb. 291, where it was ruled by Lord Ellenborough, that, where a factor, upon selling goods, takes from the purchaser a security payable to himself, and gives his own security to the principal for the net proceeds, without disclosing the name of the purchaser,—if the latter becomes insolvent before paying his security, the factor cannot compel the principal to refund the money received by him as the price of the goods. “This,” said his lordship, “is an action for money had and received, which is an equitable action, and it ought not to succeed unless

the plaintiff's claim be founded in equity and good conscience. But it would be unjust and unconscientious to throw this loss upon the defendant, if it arose from the negligence or misconduct of the plaintiffs themselves; and we have it proved that Beckwith, to whom these goods were sold, was notoriously in insolvent circumstances at the time of the sale. Upon that evidence the plaintiffs would be liable to an action for selling the goods to him; and on that ground likewise, they cannot be permitted to recover back the money they paid upon their promissory note, which they might be compelled to repay in the shape of damages." In Sedgwick on Damages, 2nd edit. p. 338, it is said: "It may be stated as a general rule, that, in all cases of agency, whether the agent be one of private selection or *virtute officii*, whether factor or sheriff, the omission or misconduct of the agent in regard to the matter with which he is charged or intrusted, renders him liable to the principal in damages; and, where he has been appointed to obtain or receive any given sum of money, or security therefor, and it appears that he was guilty of misconduct, and that the money or security was not obtained, these two facts will, in the absence of other proof, be treated as cause and effect. The negligence will be held to be the cause of the loss, and the sum of money in question, or the security therefor, will be *primâ facie* the measure of damages sustained by the principal. The damage must be proximately caused by the act or omission of the agent, but it need not be the direct result of it. 'Thus,' says Mr. Justice Story,—Story on Agency, § 218,—'if an agent knowingly deposit goods in an improper place, and a fire accidentally ensue, by which they are destroyed, he would be responsible for the loss;' and so the Master of the Rolls, speaking of trustees,—*Caffray v. Derby*, 6 Ves. 488, 495,—'If the loss had happened by fire, lightning, or any other accident, that would not be

1854.

 CHARLES
v.
ALTIN.

1854.
CHARLES
v.
ALTIN.

an excuse for them, if guilty of previous negligence.' In these cases, though the loss is not the immediate consequence of the negligence, but of the fire, still it may be truly said that it would not have occurred except from such negligence: see *Williams v. Littlefield*, 2 Wend. 362. So, if an agent, in procuring a policy of insurance, should so negligently execute his duty as that the risk (for example, a peril of the seas by which a loss was caused,) should not be included, although the loss was directly owing to the peril of the seas, still it was proximately owing to the negligence of the agent, and the principal may accordingly recover. These questions may frequently arise between merchants and insurance brokers or factors. So, in a case where the defendants, in taking out a policy for the plaintiffs, had omitted 'a liberty to touch at the Canary Islands,' and, having touched there, and being captured, the underwriters refused to pay, on the ground of deviation, Lord Ellenborough held that the plaintiffs were entitled to recover a verdict for the sum insured, deducting the premiums: *Mallough v. Barber*, 4 Campb. 150. Again, in a case where the defendant, in effecting a policy, had departed from his instructions, and, the vessel being lost, the underwriters, in consequence of the agent's neglect, were not liable, two of the underwriters for 200*l.* having paid the loss, and a third, for the same sum, having become bankrupt, Gibbs, C. J., held that the plaintiff was entitled to recover the amount directed to be insured, less the 400*l.* paid, and the 200*l.* subscribed by the bankrupt underwriter; and the plaintiff accordingly took a verdict for the balance: *Park v. Hamond*, 4 Campb. 344. In a case in New York,—*Perkins v. Washington Insurance Company*, 4 Cowen, 645, 664,—where premiums had been paid at Savannah to an agent of underwriters doing business at New York, and a bill was filed against the company to compel the execution of a policy, Mr.

Senator Colden said: 'Suppose an action had been brought against the Savannah agent for not sending the premium to New York in due time, can there be a doubt that the appellant would have recovered in a court of law, and that the measure of damages would have been the amount which was to have been insured, and for which the premium was paid?' Again, if an agent who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence. In a case on the Pennsylvania circuit,—*Morris v. Summerl*, 2 Wash. C.C.R. 203,—the late learned Mr. Justice Washington charged, 'That, in case a merchant is in the habit of effecting insurance for his correspondents, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses as an insurer, and entitled to a premium as such; that the amount of loss for which an underwriter who had subscribed the policy would have been answerable, is the only measure of damages against him. If he can excuse himself for not having effected the insurance, he is answerable for nothing: if he cannot excuse himself, he is answerable for the whole.' And it appears, that, on exception to this charge, this judgment was affirmed in the supreme court of the United States. The same point was laid down in another case by the same able judge,—*De Tastett v. Croussillat*, 2 Wash. C. C. R. 132,—still more broadly: 'The law is clear, that, if a foreign merchant who is in the habit of insuring for his correspondents here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, *not for damages merely, but as if he were himself the underwriter*, and he is of course entitled to the premium.'" Here, until the plaintiffs

1854.

 CHARLES
F.
ALTIN.

1854.

 CHARLES
 v.
 ALPIN.

sue the defendant upon the charterparty, the defendant would have no cause of action, or at all events only for nominal damages. [*Jervis*, C. J. Is there any difference in this respect between the case of a contract to effect a policy, and a contract for the delivery of goods? In the latter case, the measure of damages would be the difference between the contract-price and the market-price at the time of the breach of contract.] The principle would no doubt be the same in the two cases; but the result would be worked out differently. [*Maule*, J. Might not the defendant have brought an action against the plaintiffs for not effecting the policy within a reasonable time, although no loss had happened?] Probably he might; but, in that case, the damages would be nominal only. Here, the damages the defendant would be entitled to recover will be, what he loses under the charterparty,—what he is called upon to pay.

Channell, Serjt., in reply. To sustain this plea, the defendant must make out that the amount which the plaintiffs would recover in this action against him, would necessarily be the same as he would be entitled to recover by a cross-action against them. In *Moore*, fo. 23, pl. 80,—cited 2 Wms. Saund. 150, n., it is laid down, that “a cause of action against a plaintiff will be no bar to an action by him, for avoiding circuitry of action, when the recovery in both actions *is not equal*; as, in waste, it is no bar that the plaintiff covenanted to repair; for, in waste, the plaintiff is entitled to recover *treble* damages, but the defendant in his action of covenant will only recover *single*.” The question is, not whether the jury *may*, but whether they *must* give an equal amount. [*Jervis*, C. J. Does not the plea state that the two sums are identical?] It does so: but the demurrer does not admit that which is not well pleaded: and, unless that is a *necessary* consequence, the de-

fendant cannot be permitted to say it. In *Simpson v. Swan*, 3 Campb. 291, the factor had voluntarily parted with the money: and the point relied on by the defendant was not the principal point ruled. In *Gillett v. Mawman*, 1 Taunt. 137, A., being intrusted with goods belonging to B., undertook to get them insured: he afterwards effected an insurance, in his own name, upon property on his premises, but without making any mention of goods *held in trust*: the premises were destroyed by fire, and A. received the amount of his insurance, but which fell considerably short of his own loss. And Sir J. Mansfield said—"As to the set-off, it was proved upon the trial that the plaintiff's own loss much exceeded the sum which he had recovered from the office. The deposit was made in his own name, and, as far as it appeared, in respect of his own property: it was not proved that any of it was paid for *goods in trust*, or any thing received by the plaintiff upon that account. There was no evidence, then, of money had and received to the use of the defendant. The jury, indeed, found that the plaintiff had undertaken to insure. He neglected to fulfil his engagement, in consequence of which the defendant sustained a considerable loss. *But this loss cannot be made the subject of a set-off*: the defendant must seek his remedy by a distinct action." The doctrine of set-off certainly is not strictly applicable here; but it has a material analogy to the doctrine upon which this plea professes to be founded. The defendant seeks to shew that the policy became otherwise than beneficial to him solely in consequence of the negligent conduct of the plaintiffs; and so, he concludes, the damages are equivalent. [*Maule, J.* That may be struck out without materially altering the plea, upon the principle adopted by this court in *Brown v. Mallett*, antè, Vol. V, p. 499.] Precisely so. Unless it is a conclusion of law from the facts stated in the plea, that the two sums are equi-

1854.

CHARLES
v.
ALTIN.

1854.

CHARLES
v.
ALTIN.

valent, the plaintiffs are entitled to the judgment of the court.

JERVIS, C. J. I am of opinion that the plaintiffs are entitled to the judgment of the court upon this demurrer: and I arrive at that conclusion, because I am of opinion that the defendant has not brought himself within the rule which entitles a party to set up a cross demand by way of defence, in order to avoid the "scandal and absurdity" of a circuitry of action. It is not denied that the rule in question is plain and well ascertained, viz. that, to justify a defendant in setting up a demand in avoidance of circuitry of action, he must shew that the sum which he claims to be entitled to recover back is of necessity the identical sum which the plaintiff is suing for. The only difficulty arises from the application of the rule. I was somewhat struck by a difficulty arising from the allegation in the plea that, by and through the negligent and improper conduct of the plaintiffs in effecting the insurance, the insurance became of no use or value, and the defendant thereby sustained damages to the amount of one third of the freight so insured; and that the plaintiffs thereby became liable to the defendant for the same (being the amount in and by the first count claimed by the plaintiffs to be repaid and returned to them by the defendant), and *liable to make good to the defendant such amount as he should have to return to the plaintiffs under the charterparty*; and that the sum paid by the defendant to the plaintiffs, or recovered by them under the first count, would be the damages sustained by the defendant by reason of such improper conduct, &c. But I think my Brother Channel has relieved me from that difficulty, by suggesting that that is a mere conclusion drawn from the previous allegations,—not a conclusion of law of necessity resulting from such previous allegations, but one which a jury

might or might not arrive at. I think, that, unless the judge would be bound to tell the jury that the amount which the defendant claims by his plea is necessarily the same amount as the plaintiffs claim by their declaration, the plea does not bring the case within the rule as to circuity of action. The case differs materially from those which were cited by Mr. Rew, and commented on by my Brother Channell, in which the defendant was entitled to a liquidated and ascertained sum on the failure of the plaintiff to perform a duty. This is a matter which sounds in damages. The plaintiffs had undertaken to effect an insurance for the defendant with third persons: and it *may be* that in the result the defendant will be entitled to recover from the plaintiffs precisely the same amount of damages that the plaintiffs will recover in this action: but there are various circumstances which might by possibility arise to reduce the damages in that action to a lesser or even to a nominal amount; and, unless the defendant could negative all those possible circumstances, he could not make this a good plea. There is no authority to be found in our books shewing that the plaintiffs' remedy can be barred by a plea like this under the circumstances disclosed. A passage has been relied on from the very valuable work of Professor Sedgwick on the Measure of Damages, where that learned author is supposed to assume the law to be so in America. But I think this is not the fair inference from what is there stated. It is not laid down that the broker, if guilty of negligence in effecting the insurance, becomes himself an insurer, and liable to pay the exact amount for which the insurance was or ought to have been effected, less the amount of premium. If so, what is the premium which as matter of law is to be deducted? It clearly must mean that the amount of the loss is the *reasonable*, not the ascertained *legal* measure of damages which the party is entitled to. That is, in

1854.

 CHARLES
v.
ALTIN.

1854.

CHARLES
v.
ALTIN.

effect, the principle upon which the damages would be ascertained here. If the broker has been guilty of negligence, it is but just and reasonable that the customer should recover against him the amount of the loss, deducting what would be paid for premiums,—in other words, that he should be recompensed to the extent to which he has been damnified by his agent's negligence. But it is not a positive rule of law. If the jury in this case might, as I apprehend they might, award to the defendant a sum either less or more than the amount of the one third freight which the plaintiffs are seeking to recover, the sum sought to be recovered, and that which is sought to be set against it, clearly are not identical. The rule as to circuity of action, therefore, does not apply, and consequently the plea is a bad one, and the plaintiffs must have judgment.

MAULE, J. I am of the same opinion. The plaintiffs seek to recover a sum which in a given event the defendant has become liable to pay: and the defendant, by way of answer, alleges that the plaintiffs had, by the same contract under which his liability to them arises, undertaken to effect for him an insurance of the same identical amount, and that, by reason of the negligent and improper conduct of the plaintiffs in effecting the insurance, the policy became of no value, and the defendant sustained a loss equal to the sum claimed by the plaintiffs in the action: and the plea goes on to allege that the plaintiffs thereby became liable to the defendant for the same (being the amount claimed by the plaintiffs), and liable to make good to the defendant such amount as he should have to return to the plaintiffs under the charterparty, and that the sum recovered by the plaintiffs in this action will be the damages sustained by the defendant by reason of the plaintiffs' improper conduct, and the defendant will be damnified

to that extent. That, in my opinion, amounts to no more than an allegation that the plaintiffs are under the circumstances stated liable *in point of law*: and it would not be sustained by proof of other circumstances not alleged in the plea tending to shew that the plaintiffs were liable; but it means that the matters of fact stated in the previous part of the plea impose upon the plaintiffs a liability to that extent. The recent cases in this court and in the Exchequer Chamber shew that such an allegation will not make a pleading good which would not be good without it: if it amount to a conclusion of law,—a conclusion the court would have drawn from the facts alleged,—the pleading will be good; otherwise, not. This plea, then, must be regarded as amounting simply to this,—that the defendant employed the plaintiffs to perform something for him, that they were guilty of negligence in the performance of it, and that thereby the defendant sustained damages to the same amount as that for which they seek to charge him in this action. It is insisted that such a plea would be good, upon the principle as to the avoidance of circuitry of action; that is, that, if the plea shews that the defendant would, upon the plaintiffs' recovering against him in this action, be entitled to sue them for precisely the same amount, it offers a good bar. As, if a man covenants not to sue A. B., and he does so, the covenant enures as a release. The allegation to be relied on here, is, that, "by and through the negligent and improper conduct of the plaintiffs in effecting the insurance, the same became of no use or value, and the defendant, by reason of such improper conduct and deviation, had sustained damages to the amount of one third of the freight so insured, and the plaintiffs thereby became liable to the defendant for the same,—being the amount claimed by the plaintiffs to be repaid and returned to them by the defendant,—and liable to make good to the defendant such amount

1854.

 CHARLES
v.
ALPIN.

1854.

CHARLES
v.
ALTIN.

as he should have to return to the plaintiffs under the charterparty." Now, such an allegation as that is a mere allegation of fact: it means, that, in consequence of the plaintiffs' negligence, the defendant has sustained damage. I do not think that the concluding allegation sufficiently identifies the sum mentioned in the plea with that sought to be recovered by the declaration, so as to bring it within the rule relied on. That which is complained of in the plea would give the defendant a right of action against the plaintiffs so soon as they were guilty of the negligence charged, and the defendant was thereby damnified. That which happened subsequently does not necessarily determine the amount of damages the defendant would be entitled to. A jury might have given exactly the same amount of damages before as after the loss. The question is, what damage has the party sustained at the time the cause of action vested in him. If nothing had happened, and a policy might then have been effected, the jury would consider what was probable: if the loss had then happened, they perhaps might have given the full amount; but they were not bound to do so: there were a variety of circumstances which they might properly take into their consideration. Therefore, it is not a necessary and conclusive thing that the sum to be insured by the policy, neither more nor less, is the sum which the plaintiffs would have to pay; but a compensation for the injury resulting from their negligence. The amount of the loss actually sustained, if a loss has happened, and there is nothing peculiar in the circumstances, is a matter very fit to be considered by the jury in estimating the damages: but they are not bound by it; they are to take all the circumstances into their consideration, and to say what damages the party is upon the whole reasonably entitled to recover for the non-performance of that which he has contracted to perform. The jury, indeed, are bound not

to give more than the amount of the loss which has actually been sustained. The loss is not, however, to be necessarily treated as a liquidated amount,—an amount by which the jury are to be bound. The allegation, therefore, in this plea does not in my opinion bring the case within the rule as to circuity of action.

1854.

CHARLES
v.
ALTIN.

CRESSWELL, J. I am entirely of the same opinion, and for the reasons so fully stated by my Brother Maule, viz. that there is no identity between the sum claimed by the plaintiffs in the declaration, and the *damages* which the defendant claims by his plea to be entitled to recover from the plaintiffs. The two sums not being necessarily the same, it follows that the defendant's right to sue for the latter cannot be pleaded under the rule as to the avoidance of circuity of action.

CROWDER, J. I have entertained considerable doubts during the argument, and I must confess those doubts are not altogether removed: and, although my Lord and my two learned Brothers think otherwise, it is with considerable reluctance that I should come to the conclusion that the plea is no answer to the declaration. The rule as to the avoidance of circuity of action is in my opinion a just and valuable one; and it is important that a case should be brought within it, if possible. In point of fact and common sense, nobody can doubt, that, if these plaintiffs recover back the one third freight to-day, and the defendant were to bring a cross-action against them, and to allege and prove that which is stated in this plea, the jury would be directed to give damages to precisely the same amount. That, perhaps, does not necessarily bring the case within the rule in question. Nor is the rule laid down by Professor Sedgwick quite clear upon the subject. The language quoted from Mr. Justice Washington, at p. 340, is certainly very strong:

1854.

CHARLES

v.

ALTIN.

“The law is clear, that, if a foreign merchant who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium.” It is not said, that, as a positive matter of law, he is responsible to that extent. It probably amounts to this, that the loss would be the reasonable measure of damages. The learned judge is referring to a course of dealing. The case before us arises upon a contract to insure the amount,—*the precise amount*,—which the plaintiffs are claiming under the charterparty to have returned to them: and the question is, whether the breach of the engagement to insure does not so clearly entitle the defendant to recover from the plaintiffs the precise sum which they by their action are seeking to recover from him, as to warrant the plea. If this had been a contract of indemnity, there could have been no doubt. Inasmuch, however, as there is no authority precisely in point, I agree, though with great reluctance, and considerable doubt, in the conclusion to which the rest of the court have come.

Judgment for the plaintiffs.

1854.

FISCHEL v. SCOTT and Others.

June 12.

THIS was an action for non-delivery of a quantity of oil pursuant to a contract.

The declaration stated, that, on the 19th of August, 1853, it was agreed by and between the plaintiff and the defendants, that the plaintiff should buy of the defendants, and that the defendants should sell to the plaintiff, the two under-mentioned parcels East India Gingelly oil *expected to arrive from Madras*, warranted of good merchantable quality, at 42*l.* per ton duty-free, revenue tares and usual draft, to be paid for, at the landing weights, in fourteen days from each separate parcel being landed and ready for delivery after arrival, in ready money, allowing 2½ per cent. discount, that is to say, forty-four hogsheads, by a vessel called the Koh-i-noor, and one hundred hogsheads by a vessel called the Resolute; and that, should either the above parcels Gingelly oil not turn out equal in quality to the warranty specified above, that contract was not to be cancelled on that account, but the same was to be taken with an allowance to be fixed by the brokers of the plaintiffs and defendants: That the plaintiff was always ready and willing to receive and pay for the said oil, and to perform his part of the said contract, and had done everything necessary to entitle him to have the same fulfilled: That the said one hundred hogsheads of Gingelly oil did so arrive as aforesaid in and by the said ship Resolute, within the true intent and meaning of the said agreement, and a reasonable time for the fulfilment of the said contract, and for the delivery of the said 100 hogsheads of oil by the defendants to the plaintiff elapsed before this suit:

A. contracted to sell to B. 100 hhds. of Gingelly oil "expected to arrive by the ship Resolute from Madras." The Resolute arrived with 100 hhds. of Gingelly oil on board, but it turned out that 34 hhds. only were consigned to or under the power or control of A.:—
Semble, that this did not excuse A. for the non-performance of his contract, and that it would not be performed by a delivery or tender of the 34 hhds. over which he *had* control.

1854.

 FISCHER
 v.
 SCOTT.

Yet the defendants had not delivered the said 100 hogsheads of Gingelly oil, or any part thereof, to the plaintiff; and, by reason of the said conduct of the defendants, the plaintiff had lost and been deprived of the benefit of the said bargain, and of great profits which would have accrued to him therefrom, and had also been rendered unable to fulfil other contracts entered into by him for the re-sale of the said oil, by reason whereof he had been obliged to pay large sums of money by way of damages to his buyers: And the plaintiff claimed 1000*l*.

Third plea.

Third plea,—that, although one hundred hogsheads of Gingelly oil, and more, that is to say, 164 hogsheads of Gingelly oil, did arrive from Madras in and by the said ship *Resolute*, yet that the said ship was a general ship employed in and about the conveyance of goods for various persons unconnected with each other, and that thirty-four of the said hogsheads of Gingelly oil, and no more, were shipped for or on account of the defendants; and that the residue of the *said* hogsheads of Gingelly oil, that is to say, 130 hogsheads thereof, were shipped for and on account of and to the order of other persons than the defendants, or any of them; and that the defendants had not, nor had any of them, then or at any time any property or interest in, or control or power to deliver, the said residue of the said hogsheads of Gingelly oil; and that the defendants, within a reasonable time after the arrival of the said 34 hogsheads of Gingelly oil, were ready and willing, and then tendered and offered to deliver the same to the plaintiff; yet that the plaintiff did not nor would accept or receive the same, but then wholly refused then or at any time to accept or receive the same, and wholly discharged the defendants from delivering the same to the plaintiff.

Demurrer.

The plaintiff demurred to the third plea,—the ground of demurrer stated in the margin, being, “that, as one hundred hogsheads of Gingelly oil did arrive by the ves-

sel, the defendants were bound to deliver them, according to their contract."

1854.

FISCHEL

v.

SCOTT.

Willes, in support of the demurrer. (a) The facts disclosed on this record are these:—The *Resolute* being on her way from Madras to London, the defendants contracted to sell to the plaintiff 100 hogsheads of Gingelly oil, which they expected to arrive by that vessel consigned to them; and that, on the ship's arrival here, it was found that 34 hogsheads only of the hundred on board her were the property of the defendants. It has been decided that a contract of this kind is subject to the double contingency of the arrival of the vessel named, and of the goods being on board: the question now sought to be raised is, whether it is subject to the further contingency of the goods belonging to the vendor, or being subject to his control. It is submitted that there is nothing upon the face of this contract to limit it in the way suggested. The construction of the contract would be precisely the same, if, instead of being described as "100 hhds. by a vessel called the *Resolute*," the oil had been described as marked with a diamond, or any other mark or brand. [*Maule*, J. The oil is described pretty clearly: the question is whether the oil which came was oil "expected to arrive per *Resolute*." *Jervis*, C. J. It is quite inconsistent with this plea that the oil contracted to be sold to the plaintiff did not arrive

(a) The points marked for argument on the part of the plaintiff, were,—"That the third plea was bad, because it shewed that the 100 hogsheads did arrive, and the defendants had no sufficient excuse for not delivering them; that the defendants should have ascertained that the 100 hhds. were theirs

before contracting to deliver them; that the contract implied a warranty, that, if the vessel arrived, and there were 100 hhds. on board, the defendant could and would deliver them; and that the plea was consistent with the arrival of the 100 hhds. contracted for."

1854.

 FISCHER
 v.
 SCOTT.

by the Resolute. The oil which was expected did arrive. The defendant expected it to come consigned to him : but it turned out that it was consigned to some one else.] The substance of the plea, is, that the oil, whether expected or not, was not the defendants' property : that clearly is no answer. The case of *Hayward v. Scougall*, 2 Campb. 56, is distinguishable from this. There, the defendants sold to the plaintiff certain hemp, to be shipped at Riga, under the following sold-note,—“Sold for Messrs. Scougall & Co., for Messrs. Maynard & Co., all the sound marketable Riga hemp that may be loaded by the Pilgrim, Webster, and one or two other ships, not exceeding 300 tons, now at Riga, *by the supercargo of the said vessels, or Messrs. Schmids & Co., the agents of the concern* ; the names of the ships to be given up when received, at 81*l.* per ton, &c.” Schmids & Co. shipped on board these vessels only 71 tons of hemp on account of the defendants, but upwards of 300 tons on account of other persons : and it was held, that the contract must be confined to such hemp as Schmids & Co. should ship as agents to the defendants, and that the defendants were not answerable to the plaintiffs for more than the 71 tons. And Lord Ellenborough said : “As all the hemp which the Schmids were to ship at Riga was not to belong to the defendants, this renders it improbable that they should mean to sell what was not their own. In the case alluded to (a), the party had agreed to ship and deliver a certain quantity of hemp, and, to be sure, nothing could excuse him from doing so. But here the defendants only sold what they supposed their agents would ship for them. No doubt, they expected Schmids & Co. to ship at least 300 tons of hemp on their account ; but they were disappointed. They seem to have contemplated the possibility of this. They say, in substance, ‘We will sell you all that our agents

(a) *Splidt v. Heath*, 2 Campb. 57, n.

at Riga send for us, to the amount of 300 tons. If they send us so much, you shall have it: if they send us none, we have sold none to you.' The words employed are by no means strong enough to intimate that they had undertaken to sell that which did not belong to them, and over which they had no control. They only refer to the hemp shipped by Schmids & Co. as their own agents. 'Agents of the concern' must mean agents quoad hoc, not general agents in the Baltic trade." *Splidt v. Heath* is very similar to *Johnson v. Macdonald*, 9 M. & W. 600. There, the defendant by a bought and sold-note agreed to sell the plaintiffs "100 tons of nitrate of soda, at 18s. per cwt., to arrive *ex Daniel Grant*, to be taken from the quay at landing weights, &c.;" and below the signature of the brokers there was the following memorandum,—“Should the vessel be lost, this contract to be void:” and it was held, that the contract did not amount to a warranty, on the part of the seller, that the nitrate of soda should arrive if the vessel arrived; but to a contract for the sale of goods at a future period, subject to a double condition, of the arrival of the vessel, with the stipulated cargo on board. And Alderson, B., said: “It is more rational to construe the words ‘to arrive’ in the light of a condition, than as amounting to a warranty.” [*Jervis*, C. J. How is this plea an answer to the declaration?] It is clearly no answer to a breach of a contract like this, that the shipment the defendant expected has not taken place. The defendant has undertaken to deliver to the plaintiff 100 hogsheads of Gingelly oil “expected to arrive from Madras, by the *Resolute*.” More than 600 tons *did* arrive by that vessel. If, besides the double condition before adverted to, the defendants intended their liability to deliver the oil to be subject to a further condition, that the oil should be consigned to them, they should have introduced it into the contract, as was done in *Lovatt v. Hamilton*, 5 Exch. 639.

1854.

 FISCHER
 v.
 SCOTT.

1854.

FISCHEL

v.

SCOTT.

Tomlinson, contra. (a) The question is, whether, by the terms of this contract, it is not to be understood that the parties contemplated as a further implied term, that the oil which was expected should be at the disposal of the defendants. It is not to be assumed that the defendants would sell goods which belonged to third persons. [*Jervis*, C. J. The question is, whether the contract *must* mean something in which the defendants have a property, and which they have power to deliver.] It is submitted, that, taking the whole contract together, that is the necessary effect of it. [*Maule*, J. Suppose it appeared clearly that the parties were speaking of an expectation that some oil would come into the market,—the defendants disclaiming to have any property or interest in it, but yet contracting to deliver it; would the defendants be entitled to a verdict, if it should turn out that the oil did not arrive?] Probably not. But that is not this case. Giving a reasonable construction to this contract, it refers clearly to oil which is expected, and which the parties contemplate will be subject to the power and control of the defendants. The contract contains an express warranty as to the quality of the oil; and that affords a strong presumption that no further warranty was to be implied. [*Maule*, J. The contract simply says that the defendants agree to sell to the plaintiff certain oil expected to arrive by a particular vessel. The defendants mean to abide by their contract if the oil arrives, whether there is any warranty of title or not.] If that be the true construction of the contract, undoubtedly the plea is no answer. In *Boyd* v.

(a) The points marked for argument on the part of the defendants, were,—“That the contract was conditional on the arrival of the vessel, with goods of the description contracted

to be sold, for and on account of the defendants; and that the defendants did not undertake to sell goods which did not belong to them, and over which they had no control.”

Siffken, 2 Campb. 326, it was held, that, if there be a contract for the sale of goods by a particular ship, *on arrival*, this means on the arrival of the goods which the ship is expected to bring; and, if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery. "I clearly think," says Lord Ellenborough, "*on arrival* means on arrival of the hemp. *The parties did not mean to enter into a wager*. By *sold* and *bought* in the note, must be understood, *contracted* to sell and to buy. The hemp was expected by this ship. Had it arrived, it was sold to the plaintiff. As none arrived, the contract was at an end." And, in *Hawes v. Humble*, 2 Campb. 327, n., a contract in similar terms was held by Wood, B., in like manner to be conditional,—in the absence of default on the part of the vendor. The case of *Hayward v. Scougall*, 2 Campb. 56, is hardly to be distinguished from the present case. [*Maule, J.* There, the hemp contracted to be sold, was hemp which might be loaded on board certain ships by Messrs. Schmidts & Co.; and it was properly held that the vendees were not entitled to more than was actually loaded by Schmidts & Co.]

1854.

 FISCHER
 v.
 SCOTT.

Tomlinson, finding the impression of the court to be against him, asked leave to amend his plea, by alleging, that, of the 100 hogsheads of oil which were expected by the *Resolute*, 34 hogsheads only did arrive in which the defendants had any interest, that they tendered those to the plaintiff, and that he refused to receive them.

Willes submitted that that would be an equally bad plea, inasmuch as, the contract being for 100 hogsheads expected to arrive by the *Resolute*, if 100 hogsheads did

1854. not arrive, the condition was not fulfilled, and the plaintiff was not bound to take a less quantity.

FISCHER
v.
SCOTT.

After a short discussion, however, the defendants had leave to amend on the usual terms,—the amendment to be made within three days.

Rule accordingly. (a)

(a) The amendment was not put upon the contract by the made, the defendants having court, and paid the damages assented to the construction assessed upon that footing.

EVAN LLOYD, and ANNE, his Wife, v. DAVIES.

June 2.

Testator by his will (made after the passing of the 7 W. 4 & 1 Vict. c. 26), devised all his real and personal estate to his "three unmarried daughters, A., B., and C.," as tenants-in-common in fee. By a codicil he declared, that, "in case one of my daughters, A., B., and C., should get married, the two then remaining single, shall, at the end of twelve months after my decease, pay to the married sister the sum of 500*l.* in lieu of any further claim whatsoever on my property; and the two surviving daughters then single above named, to be sole possessors of all my property named in this my last will and testament, and to their heirs for ever."

THIS was an ejectment brought to try the title to certain premises situate at Ruthin, in the county of Denbigh.

The defendant, admitting the title of the plaintiffs to one undivided third part of the premises in question, defended as to the remaining two thirds.

The cause was tried before Williams, J., at the last Spring Assizes for the county of Denbigh. The facts were as follows:—David Davies, the father of the plaintiff Anne Davies, on the 27th of October, 1843, having then three daughters unmarried, viz. Anne (the plaintiff), Harriet, and Martha, made his will, as follows:—

"In the name of God, Amen. I, David Davies, of Ruthin, in the county of Denbigh, shopkeeper, being of sound mind and memory, do make this my last will and testament in manner following, that is to say, I

Held, that the codicil contemplated the marriage of a daughter in the life-time of the testator,—or, at all events, within twelve months after his decease.

give, devise, and bequeath all my real and personal estates, of what nature or kind soever (subject to my just debts, funeral, and testamentary expenses) to my three unmarried daughters, Anne, Harriet, and Martha, share and share alike, as tenants in common, and not as joint-tenants, and to their respective heirs, executors, administrators, and assigns. I nominate, constitute, and appoint my said three daughters, Anne Davies, Harriet Davies, and Martha Davies, executrixes of this my will. I advise my daughters to sell the four large houses and thirteen cottages in Borthyn, as soon as an advantageous sale can be effected: and, should they not wish to continue shopkeeping, I advise them to endeavour to sell the shop goods and stock at a valuation, rather than by auction. I desire to be buried in as plain a manner as possible; not more than six or eight to attend my funeral, besides the bearers. No scarfs to be used. In witness whereof I have hereto set my hand this 27th day of October, 1843.

1854.

 LLOYD
v.
DAVIES.

 Will of David
Davies.

“ David Davies.”

“ Published and declared by the testator to be his last will and testament, in the presence of us, who, in his presence, and in the presence of each other, have subscribed our names as witnesses.

“ Joseph Peers. T. P. Overton.”

He afterwards, on the 23rd of August, 1844, made a codicil to his will, as follows:—

“ A codicil to my last will and testament, made August 23rd, 1844. It is my desire, that, in case one of my daughters named in this my last will, named Anne, Harriet, and Martha, should get married, that the two then remaining single shall, at the end of twelve months after my decease, pay to the married sister the Codicil.

1854. sum of 500*l.* in lieu of any further claim whatsoever on my property; and the two surviving daughters then single above named, to be sole possessors of all my property named in this my last will and testament, and to their heirs for ever. Witness my hand, the above date.

LLOYD
v.
DAVIES.

“David Davies.”

“Published and declared by the testator to be his last will and testament, in the presence of us, who, in his presence, and in the presence of each other, have subscribed our names as witnesses,

“John Pierce. Owen Jones.”

The testator died on the 16th of September, 1844, without having further altered his will. Upon his death, the three daughters took possession of the property, and enjoyed it as tenants-in-common down to the 14th of October, 1845, when Martha married one Thomas Roberts, the two unmarried sisters paying her on the day preceding the marriage the sum of 500*l.* pursuant to the terms of the codicil, and receiving thenceforth the rents and profits of the estate in moieties. In 1848, Anne Davies married the plaintiff, Lloyd; on which occasion she refused to accept the 500*l.* under the codicil. On the 7th of July, 1853, Harriet, the testator's remaining daughter, died, unmarried and intestate, leaving the defendant, her eldest brother and heir-at-law, who, claiming to be entitled to a moiety of the real estate of which Harriet died possessed, took possession of the premises which formed the subject of contention in this action.

The plaintiffs by their writ claimed to be entitled to the whole property, upon the ground that Anne and Harriet were not tenants-in-common, but joint-tenants; insisting that the effect of the codicil was, to create a joint interest in the two daughters Anne and Harriet,

upon the marriage of Martha, in which case Anne, as the survivor, would be entitled to the whole; and that, assuming that the codicil left the two sisters tenants-in-common, the defendant could only be entitled to a moiety, instead of the two-thirds he claimed, and consequently, unless the codicil was to be considered as altogether inoperative, the plaintiffs were at all events entitled to recover something.

1854.

 LLOYD
v.
DAVIES.

For the defendant, it was insisted,—first, that, in the events which had happened, the codicil was altogether inoperative, inasmuch as it contemplated the marriage of one of the daughters in the life-time of the testator, or within twelve months after his decease, and consequently that Martha, notwithstanding her marriage, continued to be entitled as tenant-in-common with her sisters,—secondly, that, if the codicil operated at all, it merely affected the interest of the marrying daughter, leaving that of the other two as before; in other words, that the effect of the codicil was, not to alter the *quality*, but only the *quantity* of the estate.

A verdict having been found for the plaintiffs, with a reservation of leave to enter a verdict for the defendant, or a nonsuit, on the points made at the trial,—

Beavan, in Easter Term last, obtained a rule nisi accordingly.

Welsby and *Morgan Lloyd* now shewed cause. It being conceded that the plaintiffs are entitled to one third of the property in question, and the defendant appearing and defending in respect of two thirds, the plaintiffs will be entitled to a verdict if they can establish their right to more than the one third. In no view can the *defendant* be entitled to more than a third. The argument on the part of the defendant will be,—first, that the codicil has no operation, in the events

1854.

LLOYD
v.
DAVIES.

which have happened, because it contemplated the marriage of one of the three daughters in the testator's life-time, or within twelve months after his death,—secondly, that, if it has any operation at all, it merely operated to affect the interest of the daughter marrying, leaving the interests of the other two as they stood before. Neither of these positions, it is submitted, can be maintained. In the first place, it is manifest that the codicil was intended to operate, although the contemplated marriage did not take place in the life-time of the testator, or within twelve months after his decease. The will bearing date after the statute 7 W. 4 & 1 Vict. c. 26, no contrary intention appearing upon the face of them, the will and codicil must be taken to speak from the death of the testator, and to have reference to events which were to happen after that time. The expression as to the marriage, in the codicil, is general: the only limitation in point of time refers to the period of payment of the 500*l.*, which in that event is to be made within twelve months,—evidently meaning that the two daughters remaining single shall have the same period for the payment of that money as they would as executrixes have for the payment of any other demand. [*Jervis*, C. J. What is to happen if they do not pay it? The testator does not say that the estate shall vest in the two *upon payment* of the 500*l.* *Maule*, J. If your construction of the codicil be correct, the property never could be sold.] In all probability, the testator was providing for an event which he knew was not very distant. Suppose two of the daughters had married in the life-time of the testator, in that case clearly the codicil could have had no operation at all. [*Crowder*, J. Does not the codicil contemplate that the marriage shall take place during the testator's life-time, or within twelve months after his death?] It is submitted that that is not the true construction. The period of marriage is

left altogether at large. [*Crowder, J.* When is the 500*l.* to be paid?] On the marriage; or, if it takes place within twelve months after the testator's decease, the sisters who remain single are not to be compelled to pay the money until the expiration of the twelve months. [*Maule, J.* If the codicil is to be construed as pointing at a marriage at *any time*, it would follow, that, if one of the three sisters should marry fifty years after the death of the father, the other two remaining single, she would have been enjoying her share of the estate as a tenant-in-common with her sisters for all that period, and then receive 500*l.* I think that shews, that, in order to effectuate the intention of the testator, the 500*l.* must be taken to be payable in such a time as that it may be in lieu of all but the 500*l.* The codicil contemplates such a marriage only as shall make the 500*l.* a satisfaction of her claim to every thing but the 500*l.* Suppose the property had consisted of leaseholds having sixty years only to run, or of mines, and the leases had expired or the mines become exhausted, would one upon her marriage then be entitled to 500*l.*? The true construction I take to be this:—The marrying daughter is to take 500*l.* and no more, and the two remaining unmarried are then to be the sole possessors of *all* the property.] If the testator had intended to limit it to a marriage in his life-time, he would have said so. [*Maule, J.* I understand him to mean that his three unmarried daughters should take, at his death, as tenants-in-common: but, that, if one should be married at that time, the other two, remaining single, should take the whole, paying 500*l.* to their sister.] Suppose two of them should get married? [*Maule, J.* Possibly there might be more difficulty in construing the will in that case. [*Cresswell, J.* It is quite consistent with the 24th section of the 7 W. 4 & 1 Vict. c. 26, that the testator may have thought he should live for twenty years.

1854.

 LLOYD
 v.
 DAVIES.

1854.

LLOYD
v.
DAVIES.

Crowder, J. My impression was, that that section meant to place real and personal property on the same footing.] The codicil, it is submitted, points at a thing which is to be done, not at the time of the death of the testator, but at the time of the marriage of one of the three daughters, whenever that might happen, the others remaining single; the estate in that event to vest in the two. If the court entertain a clear impression against the plaintiffs' construction of the codicil, it will be unnecessary to consider the other point.

Byl es, Serjt., and *Coxon*, were not called upon to support the rule.

JERVIS, C. J. I am of opinion that this rule ought to be made absolute. This is an ejectment. The defendant admits that the plaintiffs are entitled to one third of the property sought to be recovered, and he defends for the remaining two thirds. If the codicil, taken in connection with the will, does not operate to give to the testator's daughters Anne and Harriet the whole estate, either as tenants-in-common or as joint-tenants, the defendant is well defended, because it is admitted that the plaintiff Anne Lloyd, and the defendant as the heir of Harriet, take each one third, and consequently the plaintiffs cannot succeed. That being the correct view of the case, it is unnecessary to consider whether the codicil created in the two daughters remaining unmarried an estate as tenants-in-common or as joint-tenants; because, in the events which have happened, the codicil did not come into operation at all. The testator by his will gave to each of his three unmarried daughters, named, one third of his real and personal estates, as tenants-in-common (as to the realty) in fee. Martha, therefore, took by the will an absolute estate in fee-simple as to one third. Mr. Welsby con-

tends, that, by force of the codicil, the estate which once was in Martha became divested by her marriage. For such a purpose very clear and unequivocal words would be required. But there is another objection, which was very forcibly put by my Brother Maule in the course of the argument. By the will Martha was to take, on the death of her father, a third of the freehold in fee, and an absolute interest in a third of the personalty. Now, whether the codicil contemplated the marriage of Martha within twelve months after the death of the testator, or a marriage generally, in either view the plaintiff is wrong. It is impossible that the testator could have meant that the three daughters should take at his death each a third of the freehold as tenants-in-common in fee, and an absolute interest in a third of his personal estate, and that, in the event of one of the daughters marrying at any time,—say after having enjoyed the third of the freehold for twenty or thirty years,—her interest should be defeasible upon her sisters (they remaining unmarried) paying her 500*l*. Mr. Welsby says it is difficult to suppose that the testator could have contemplated the marriage of a daughter *in his life-time*, because it would be impossible to put a sensible construction upon the will and codicil if two of the three should so marry. But I must confess I do not appreciate the difficulty. The words of the codicil are,—“It is my desire, that, in case one of my daughters named in this my last will should get married, the two then remaining single shall, *at the end of twelve months after my decease*, pay to the married sister the sum of 500*l*. in lieu of any further claim whatsoever on my property; and the two surviving daughters *then* [that is, at the time of the marriage of the third] single above named, to be sole possessors of *all* my property named in this my last will and testament, and to their heirs for ever.” This would seem to mean that the two single daughters

1854.

 LLOYD
 v.
 DAVIES.

1854.

LLOYD

v.

DAVIES.

surviving the testator,—the other having married in his life-time,—should take the whole, paying 500*l.* to the married sister : and this, as it seems to me, amply satisfies all the words of the codicil ; and I should have no difficulty in putting that construction upon it, if it were necessary. But it is quite clear that the marriage contemplated must be one which was to take place within twelve months after the testator's death, and therefore the circumstances have not occurred upon the occurrence of which the codicil would attach.

MAULE, J. I also am of opinion that the rule should be made absolute. It is admitted by the defendant that the female plaintiff was entitled under the will of David Davies to one third of the property in question ; and it appears to me that the will is in no degree operated upon by the codicil, which was intended to take effect only upon the happening of an event which has not happened. By his will, the testator makes a simple disposition of all his property to his three then unmarried daughters, Anne, Harriet, and Martha, as tenants-in-common in fee ; and he appoints them executrixes. He afterwards makes a codicil in which he provides, that, in case one of his daughters named in his will should get married, the two then remaining single should, at the end of twelve months after his decease, pay to the married sister 500*l.* in lieu of any further claim on his property ; and that the two surviving daughters then single, and their heirs, should be the sole possessors of all his property. The will being a disposition of all the testator's property, the codicil is also a disposition of the whole property, which is to be substituted, in a certain event, for that contained in the will,—that event being, the marriage of one of his daughters. On that event happening, the daughter marrying was to have from the others remaining single 500*l.*, which was to be in lieu and instead of any further

or other claim, and the *whole* remaining property was then to go to the other two. The testator, therefore, contemplated as well by the will as by the codicil a complete disposition, to operate upon the *whole* of his property,—only the one to be substituted for the other, in the event mentioned. The codicil, therefore, as it seems to me, was intended to take effect, if at all, at the time when it should become necessary to ascertain whether the will or the codicil was to operate,—when it was first to be ascertained who was to take the property. Then, is the time, as it seems to me, to inquire whether or not the event has taken place which was to have the effect of substituting the disposition contained in the codicil for that originally contained in the will. This is not like the case of an estate going over upon a condition. The language of the will and the codicil shew that the latter was intended to take effect at the time at which the will would have taken effect if there had been no codicil. The nature of the event,—as to time and everything else,—must be such as to take away all operation from the will, if the codicil was to operate. We must put such a construction upon both as will if possible effectuate the testator's intention. I think the proper construction of the will and the codicil, taken together, is, that the contemplated marriage, in order to give any operation at all to the codicil, must take place before the time when the will or the codicil could take effect, viz. before the death of the testator. That, no doubt, is open to some objection: but, upon the whole, I think that the marriage intended was a marriage which was to take place in the life-time of the testator. It is quite possible that the testator might have had some vague notion that his will would not come into operation until the expiration of twelve months after his decease: and, if that were so, it might be that he contemplated the marriage of one of his daughters within the same period. It is unneces-

1854.

LLOYD
v.
DAVIES.

1854.

LLOYD
v.
DAVIES.

sary, however, to speculate upon that, inasmuch as in neither event could the codicil have effect, seeing that the marriage of Martha did not take place until more than twelve months had elapsed from the death of the father.

CRESWELL, J. I quite concur in the view taken by my lord and my Brother Maule. The testator unquestionably intended, either by his will or by the codicil, to dispose of the whole of his property immediately upon his death. The event not having happened upon which alone the codicil was to take effect, the will is the only testamentary disposition of the party. Even if the true construction of the codicil be, that the contemplated marriage should happen within twelve months after the testator's decease, the same result will follow, because the marriage of Martha did not take place until after that period. The rule must, therefore, be made absolute to enter a verdict for the defendant.

CROWDER, J. I am much disposed to think that the testator, foreseeing the marriage of one of his three daughters at no very distant period, contemplated that that event might take place at some time between the 23rd of August, 1844, the date of the codicil, and twelve months after his decease. He says, "It is my desire, that, in case one of my daughters named in this my last will, should get married, the two then remaining single shall, *at the end of twelve months after my decease*, pay to the married sister the sum of 500*l.* in lieu of any further claim whatsoever on my property; and the two surviving daughters then single above named, to be sole possessors of all my property named in this my last will and testament, and to their heirs for ever." It may be, as my Brother Maule suggests, that, in order to make the codicil take effect, the marriage must take place

during the life-time of the testator. But, at all events, if it might take place after the testator's death, it is clearly limited to twelve months after that period. At the time the 500*l.* is to be paid, there must be the married sister. Unless there is such, the codicil cannot take effect. In my view, therefore, in the events which have happened, the codicil can have no operation at all.

1854.

LLOYD
v.
DAVIES.

Rule absolute.

ELSAM and Another v. DENNY and Another.

June 12.

THIS was an action by the indorsees against the acceptors of a bill of exchange.

The declaration stated, that certain persons trading under the name, style, and firm of M. Evans & Co., on the 17th of March, 1853, by their bill of exchange, now overdue, directed to the defendants, required the defendants to pay to their order 477*l.* 18*s.*, for value received in consignments outwards, three months after the date thereof; and the defendants then accepted the said bill; and the said persons so trading as aforesaid indorsed the same to the plaintiffs; but the defendants did not pay the same.

The defendants pleaded, amongst other pleas, that, after the alleged indorsement, the said drawers, at the request and on behalf of the defendants, handed over and paid to the plaintiffs, in order and upon the terms that they should thereupon *retire* and deliver up to them, the said drawers, the said bill of exchange, discharged of all claim thereon by the plaintiffs against the

The word "*retire*" in reference to a bill of exchange, is susceptible of various meanings, according as it is applied to various circumstances: if the *acceptor* retires the bill at maturity, he takes it entirely from circulation, and it is in effect paid; but, if an *indorser* retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold it with the same remedies as he would have had if he had been called upon in due course, and had

paid the amount to his immediate indorsee: and this latter is the *ordinary* meaning of the word "*retire*."

1854.

 ELSAM
 v.
 DENNY.

said drawers and the defendants, a sum of money equal in amount to the sum specified by the said bill, or at any time to be recoverable thereupon, which sum of money the plaintiffs received from the said drawers upon the terms aforesaid, and ought thereupon, as they well knew, to have so retired and delivered up to the said drawers, who were entitled thereto, the said bill, discharged as aforesaid, and thereupon all claims of the plaintiffs against the said drawers and the defendants upon the said bill were actually satisfied and discharged out of such money; and that the plaintiffs, wrongfully, and in fraud of the said terms, and against the will of the drawers, and not as trustees for them, had continually hitherto retained, and then put in suit the said bill in this action. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows :—

On the 26th of February, 1853, one Evans drew upon the plaintiffs a bill at four months for 477*l.* 18*s.*, which they accepted for his accommodation, upon an understanding that he should give them in exchange an acceptance of Denny & Clarke, the defendants, for the like amount. Evans took the plaintiffs' acceptance to the defendants, and, on the 17th of March, 1853, drew upon them, at three months, for 477*l.* 18*s.*, the bill for the recovery of which this action was brought,—which they accepted for his accommodation, and which he handed to the plaintiffs. The plaintiffs got this last-mentioned bill (which would become due on the 20th of June, 1853,—nine days before their own acceptance in favour of Evans,) discounted by Messrs. Overend, Gurney, & Co.

Evans was deeply indebted to Denny & Co.; and Denny & Co., who were in difficulties, suspended payment in April, but afterwards resumed.

Early in June, before either of the above-mentioned bills had become due, the plaintiffs being anxious about the defendants' acceptance, it was proposed by Evans's clerk that Evans should draw upon the plaintiffs another bill, for the purpose of providing funds to take up the defendants' acceptance. The plaintiffs assented to this proposition, but required that it should be put into writing; and accordingly the following document was drawn up, signed by Evans, and sent to the plaintiffs:—

1854.

 ELSAM
 v.
 DENNY.

“ June 9th, 1853.

“ Messrs. Elsam & Co.

“ Gentlemen,—In consideration of your accepting our bill upon you for 472*l.* 10*s.*, due the 7th of September next, we hereby engage to provide the funds for this bill on or before that date, as also to put you in cash to *retire* our bill upon Messrs. Denny & Co., for 477*l.* 18*s.*, due the 20th instant, on or before the 17th.”

On the 4th of June, Evans accordingly drew upon the plaintiffs a third bill, for 472*l.* 10*s.*, at four months; and, having got it discounted, Evans, on the 18th of June, sent his clerk with a cheque for 477*l.* 18*s.* to Elsam & Co.'s for the purpose of taking up the defendants' acceptance.

Evans's clerk, who was called as a witness, stated that he laid the cheque upon Elsam's desk, and said “ You will give me the bill as soon as you receive it ;” and that Elsam nodded his head, and answered “ Very well.”

At this time the defendants' acceptance was in the hands of Overend, Gurney, & Co., and Elsam went there and withdrew the bill. Evans's clerk afterwards applied to the plaintiffs for the bill, but they refused to give it up, claiming to be entitled to hold it as a collateral security for their acceptances of 477*l.* 18*s.*, due on the 29th of June, and 472*l.* 10*s.*, due on the 7th of October, both of which they in due course paid.

1854.

 ELSAM
 v.
 DENNY.

Evidence was given on both sides as to the mercantile meaning of the word "retire," in the memorandum of the 9th of June, 1853,—the plaintiffs' witnesses stating, that, according to their understanding and experience, it meant, to withdraw the bill from circulation in so far only as the party paying the money was concerned,—the defendants' witnesses, on the other hand, alleging that it meant an absolute payment and discharge of the bill.

The Lord Chief Justice, being informed that the Lord Chief Baron had, in an action by Evans against Elsam to recover the bill now in question, held that the word "retire" meant an absolute payment of the bill, in deference to that opinion, ruled in like manner.

A verdict having been found for the defendants,

Byles, Serjt., on a former day in this term, obtained a rule nisi for a new trial, on the ground of misdirection.

Hawkins, in Hilary Term last, shewed cause. The question is whether there was any evidence to go to the jury in support of the plea. In this plea, the word "retire" must mean payment. [*Cresswell, J.* Clearly it must: and, if there was no evidence of payment, the verdict cannot be supported.] If this bill had been withdrawn from the hands of Messrs. Overend, Gurney, & Co. by an indorsee, that, as between them, would amount to payment; but it would be otherwise as between the indorsee and the other parties liable on the bill. "Retire" may mean several things: it may mean that the liability of all parties to the bill is to be discharged; or it may mean that the remedy over is to be retained,—a withdrawal of the bill from circulation, without any absolute discharge. The evidence shewed that the bill was not paid by Elsam & Co. with their own money; but that they were furnished with the money by

Evans, the drawer, in order that they might retire it, and take it into their hands. Upon what terms they were to have it, was purely a question for the jury. As between Evans and Denny & Co., there can be no doubt that this was an accommodation acceptance: at all events, there was evidence upon that subject which was fairly for the jury. The agreement of the 9th of June contains not a word as to the bill being to be retained by Elsam & Co. as collateral security. The evidence of Evans's clerk shews, that, at the time they arranged with him for the withdrawal of the bill, Elsam & Co. did not set up any claim to retain the bill. In substance and in truth, the money which took the bill out of the hands of Overend, Gurney, & Co., was Evans's money: consequently, there was ample evidence to support the plea.

1854.

 ELSAM
 v.
 DENNY.

Byles, Serjt., and *Ball*, in support of the rule. There clearly was no evidence to go to the jury that the money was given to the plaintiffs upon the terms mentioned in the third plea. The original transaction was this:—Elsam & Co. and Evans agreed to exchange acceptances. In pursuance of this agreement, Evans, on the 26th of February, 1853, drew upon Elsam & Co. a bill at four months for 477*l.* 18*s.*; and he also drew a bill for a similar amount upon Denny & Co. at three months from the 17th of March, 1853, which he indorsed and handed over to Elsam & Co. The bill accepted by Denny & Co. became due on the 20th, and that accepted by Elsam & Co. on the 29th of June. Before the first of these arrived at maturity, viz. on the 9th of June, in order to provide funds to meet Denny & Co.'s acceptance, Evans agreed with Elsam & Co. that they should accept a third bill, for 472*l.* 10*s.*, which he, Evans, would get discounted, for the purpose of enabling Elsam & Co. to withdraw Denny & Co.'s acceptance from circulation. Under these circumstances, *retiring* the bill could only

1854.

 ELSAM
 v.
 DENNY.

mean withdrawing it from the hands of the party who held it, and getting it into the hands of the person who so retired it. What necessity could there be for making the payment through Elsam & Co., but that they should hold the bill for their security? It had originally been placed in their hands as security for their former acceptance. Why, then, should they not retain it as security for the substituted bill? The money handed to Overend, Gurney, & Co. was neither Evans's money nor Denny & Co.'s: it was money raised upon Elsam & Co.'s acceptance, in order that they might not be out of cash by reason of the default of Denny & Co. *Jones v. Broadhurst*, antè, Vol. IX, p. 173, (a) shews that a payment by the drawer is not necessarily such a payment as will enure to discharge the acceptor.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

This was an action by the plaintiffs as indorsees, against the defendants as acceptors of a bill of exchange drawn by one Evans on the 17th of March, 1853, at three months, for the sum of 477*l.* 18*s.*, upon and accepted by the defendants. The defendants pleaded payment of the bill.

At the trial before me in London, it was proved, that, on the 26th of February, 1853, Evans drew upon the plaintiffs a bill at four months, for 477*l.* 18*s.*, which they accepted for his accommodation, upon an understanding that he should give them in exchange an acceptance of the defendants' for the like amount. Evans took the plaintiffs' acceptance to the defendants, and, on the 17th of March, 1853, drew upon them, at three months, for 477*l.* 18*s.*, the bill now in suit, also, an

(a) And see *Belshaw v. Bush*, antè, Vol. xi. p. 191.

accommodation bill; which they accepted; and he handed it to the plaintiffs. This bill would become due on the 20th of June, nine days before that accepted by the plaintiffs. In the month of April, the defendants suspended payment, and the plaintiffs being anxious about the defendants' acceptance, it was proposed by the clerk of Evans, that Evans should draw upon them (the plaintiffs) another bill, for the purpose of providing funds to take up the defendants' acceptance. The plaintiffs agreed to this proposal, and, on the 9th of June, 1853, Evans wrote and sent to the plaintiffs the following letter:—

“Gentlemen,—In consideration of your accepting our bill upon you for 472*l.* 10*s.*, due 7th of September next, we hereby engage to provide the funds for this bill on or before that date, as also to put you in cash to *retire* our bill upon Messrs. Denny & Co., for 477*l.* 18*s.*, due the 20th instant, on or before the 17th.”

Evans then drew upon the plaintiffs a bill, dated the 4th of June, for 472*l.* 10*s.*, at four months, which they accepted, and, on the 18th of June, sent his clerk to the plaintiffs with a cheque for 477*l.* 18*s.*, to take up the defendants' bill. The clerk laid the cheque upon the plaintiffs' desk, and said “You will give me the bill as soon as you receive it.” Elsam the plaintiff nodded his head, and said, “Very well.” At the time when the plaintiffs received the cheque, the defendants' bill was in the hands of Messrs. Gurney & Co., from whom the plaintiffs received it upon payment of the amount. Evans's clerk afterwards applied to the plaintiffs for the bill, but they refused to give it up, saying that they had been advised by their friends to hold it as a collateral security. The plaintiffs paid their two acceptances for 477*l.* 18*s.*, and 472*l.* 10*s.*, as they became due. Evidence was given by the plaintiffs and the defendants to shew the mercantile meaning of the word “*retire*,” which occurs in the letter of the 9th of June. The plaintiffs' witnesses stated,

1854.

 ELSAM
v.
DENNY.

1854.

ELSAM
v.
DENNY.

that, in their experience, the word "retire," meant, taking a bill out of circulation in so far as the party who paid the money was concerned ; whereas the defendants' witnesses alleged that it meant, an absolute payment of the bill. I was told, that, in an action by Evans against Elsam, to recover the bill now in suit, the Lord Chief Baron had held that the word "retire" in the letter meant an absolute payment of the bill : and, in deference to the high authority of that learned judge, I ruled the same way. My Brother Byles having objected to my summing up in this respect, the question was discussed during the last term, upon a rule to shew cause for a new trial ; and this court took time to consider their judgment, wishing to know the decision of the court of Exchequer upon the point, and being anxious to be guided by their authority. The case of *Evans v. Elsam* has now been argued in that court ; but, as the judges are not at present agreed in opinion upon the question, we must dispose of the rule in this court according to our own impression. We entertain no doubt upon the subject, and are of opinion that the rule should be made absolute.

The question turns upon the construction of the letter of the 9th of June, and the meaning of the word "retire" in that instrument. This word is susceptible of various meanings, according as it is applied to various circumstances. If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid ; but, if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had, had he been called upon in due course, and had paid the amount to his immediate indorsee. We think this is the ordinary meaning of the word "retire," and we do not doubt that it was used in that meaning in the letter of the 9th

of June, because the undertaking is not that Evans will take up the bill himself with the proceeds of the plaintiffs' acceptance, but that he will put the plaintiffs in funds, that *they* may retire the bill.

1854.

 ELSAM
v.
DENNY.

Such being the meaning of the letter of the 9th of June, the subsequent conduct of the plaintiffs and Evans's clerk is immaterial, because the plaintiffs' second acceptance was obtained, and the funds procured as the produce of that acceptance, upon the faith of the letter of the 9th of June.

For these reasons, we are of opinion that the rule must be made absolute.

Rule absolute.

CHILTON, Assignee of WILLIAM PHILIP MASTERS CROFT,
an Insolvent Debtor, v. CARRINGTON and WHITEHURST.

June 9.

THIS was an action of detinue. The declaration stated, that the defendants, after the estate and effects of the said insolvent were vested in the plaintiff as assignee as aforesaid, and before the commencement of this suit, detained from the plaintiff, as assignee as aforesaid, the goods and chattels of the plaintiff, as assignee as aforesaid, that is, a lease of premises in Great Windmill Street, Haymarket, and licences to sell beer, spirits, and liquors, and converted to the defendants' own use, or wrongfully deprived the plaintiff, assignee as aforesaid,

By agreement between A., a publican, and B., a brewer, it was stipulated that A. should deposit the lease of his house with B., as security for an advance of 150*l.*, for which A. had given B. a promissory note, payable on demand; and B. engaged not to call upon

A. to pay the 150*l.*, or any part thereof, for two years, upon condition that the interest thereon should be duly paid half-yearly, that the rent should be paid agreeably to the covenants of the lease, and that A. should take of B. all the beer consumed upon the premises, and pay for it every twenty-eight days. The agreement then provided, that, in case of failure on the part of A. to perform any or either of the above conditions, after fourteen days' notice, B. should be at liberty immediately to put the note in force, and, if not paid, with interest, to sell the lease; and that all expenses attending such sale, together with the principal and interest due on the note, should be deducted from the amount realized by such sale, *as also any account that might be then due and owing for beer* :—

Held, that,—the power of sale not having been exercised,—on payment, or tender, of the principal and interest due on the note, A. (or his assignee) was entitled to maintain detinue for the lease; and that B. could not set up a lien on it for a balance due on the beer account.

1854.
CHILTON
v.
CARRINGTON.

of the use and possession of the said goods and chattels of the plaintiff, as assignee as aforesaid; and, by reason of the premises, and before this suit, the plaintiff, as assignee as aforesaid, was prevented from selling, and lost divers opportunities of selling, on advantageous terms, the said premises, and was prevented from obtaining and receiving certain sums and prices for which he had sold the same, and was prevented from completing a sale thereof and conveyance thereof to James Ward, and from receiving large sums and prices from him; and by reason also of the premises, and of the inability of the plaintiff, occasioned by the defendants' wrong as aforesaid, to complete the said sale, the plaintiff, as assignee as aforesaid, was obliged to keep persons in possession of the said premises, taking care of the same, for many weeks, and to expend moneys, and part of the said estate and effects, in and about so doing; and, by reason also of the premises, and the want of possession of the said licenses, occasioned as aforesaid, the plaintiff was prevented from carrying on upon the said premises, and did not carry on, as he otherwise would have done for the benefit of the said estate, the business of a publican and dealer in spirits, and was thereby prevented from making for and on behalf of, and as part of, the said estate divers large profits: and the plaintiff, as assignee as aforesaid, claimed 200*l.*: he also demanded a return of the goods, or their value, and 500*l.* for their detention.

Third plea.

The defendants, for a third plea, as to so much of the declaration as relates to the said lease, said, that an agreement was made and executed between the defendants and the said William Philip Masters Croft before he became insolvent, which was as follows,—“Memorandum of agreement made and entered into the 17th day of April, 1852, by and between Messrs. Carrington & Whitehurst, of Brentford, in the county of Middlesex,

brewers, of the one part, and William Philip Masters Croft, of Great Windmill Street, Haymarket, in the county of Middlesex, victualler, of the other part; that is to say, The said Messrs. Carrington and Whitehurst agree to lend to the said W. P. M. Croft the sum of 150*l.* on his promissory note, payable on demand, bearing interest at the rate of 5*l.* per cent. per annum; the said W. P. M. Croft depositing the lease he holds, of which about nineteen years are unexpired, of the public-house and premises he occupies, known as the Bull's Head, situate and being in Great Windmill Street aforesaid, as security for the re-payment of the same sum of 150*l.* and interest thereon: the said Messrs. Carrington & Whitehurst agreeing not to call on the said W. P. M. Croft for re-payment of the said sum of 150*l.*, or any part thereof, for the term of two years from the date hereof, conditionally, that is to say, that the interest at the rate of 5*l.* per cent. per annum be duly paid every six months, that the rent of the same public-house be duly paid agreeably to the covenants of the lease, and also that all porter, beer, and ale consumed or sold at the said Bull's Head public-house be purchased of the said Messrs. Carrington & Whitehurst, and paid for every twenty-eight days (or at least such part as may be then disposed of), making the usual allowance of 5*l.* per cent. discount; the said Messrs. Carrington & Whitehurst undertaking to supply a good and saleable article: and, in case any or either of the said conditions should be neglected or refused to be performed, and after fourteen days' notice given in writing to the said W. P. M. Croft, his executors, administrators, or assigns, still remain unperformed, then the said Messrs. Carrington & Whitehurst shall be at liberty immediately to put the said promissory note into force, and, if not paid, together with the costs, and interest due thereon, they then shall be at liberty to sell or dispose of the said lease by

1854.

CHILTON
v.
CARRINGTON.

1854.
 CHILTON
 v.
 CARRINGTON.

public or private sale, the said W. P. M. Croft, for himself, his executors, administrators, and assigns, agreeing to execute or join in executing the assignment of the said lease to any purchaser or purchasers, as the case may be, and all expenses attending such sale, together with the principal money and interest, to be deducted from the amount realized by such sale, *as also any account that may be then due and owing for beer.* In witness, &c." Averment, that the said Messrs. Carrington & Whitehurst in the said agreement mentioned, were and are the defendants; and the said W. P. M. Croft therein also mentioned, was and is the said insolvent: That, afterwards, and before the said W. P. M. Croft became such insolvent as aforesaid, in pursuance of the said agreement, the defendants lent to the said W. M. P. Croft the said sum of 150*l.* on his promissory note, payable on demand, bearing interest at the rate of 5*l.* per cent. per annum, and thereupon the said W. P. M. Croft, and before he became such insolvent as aforesaid, did deposit with them the said lease in the said agreement and also in the said declaration mentioned, as a security as in the said agreement mentioned, and the defendants then received the same from him as such security as aforesaid, and had thence continually hitherto held, and now hold, the said lease as such security as aforesaid: That the said W. P. M. Croft had not paid the said sum of 150*l.*, or performed the said agreement, and the said conditions thereof, or any of them; wherefore the defendants had continually hitherto detained, and still detain, the said lease, as they lawfully might for the cause aforesaid; which was the detention in the declaration mentioned.

Replication to
 the third plea.

Replication, that, after the said W. P. M. Croft became insolvent as aforesaid, and after the plaintiff had become, and when he was (and as the defendants knew and had notice), assignee as aforesaid, and before this

suit, the plaintiff, as assignee as aforesaid, was ready and willing to pay to the defendants, and then tendered and offered to them to pay them a certain sum as and for (and the same being) the amount of the said principal money due on the said note, and all interest due thereon (the said lease not having been sold, and there not then being any cause or ground other than the said note and interest, by virtue of which, or any costs, money, or matter, other than the said note and interest, in respect of which, the defendants were under the said agreement then entitled to hold or retain the said lease); and the plaintiff, as assignee as aforesaid, then demanded of the defendants the delivery to the plaintiff, as assignee as aforesaid, of the said lease, and the defendants, at the time of such tender and offer and demand, and at all times thereafter, wrongfully refused to deliver the said lease to the plaintiff, and wrongfully detained and held the same from and against the plaintiff, as assignee as aforesaid, and deprived the plaintiff of the use and possession of the same, and converted the same to the defendants' use, being the causes of action as to the said lease in the declaration mentioned and complained of.

Rejoinder, that, at the time when the plaintiff, as assignee as aforesaid, made the said supposed tender, the rent of the said public-house in the said agreement mentioned had not been duly paid, agreeably to the covenants of the said lease, but, on the contrary thereof, a quarter's rent of the said public-house, due on the 28th day of March, 1854, and amounting to the sum of 17*l.* 10*s.*, was then due, owing, and unpaid to the lessor of the said public-house; and that, at the time of the supposed tender, there was due and owing to them from the said W. P. M. Croft, the sum of 37*l.* 9*s.* 6*d.* for beer sold and delivered by the defendants to him after the making of the said agreement in the third plea set forth, and before he became insolvent, and for and in

1854.

CHILTON
v.
CARRINGTON.

Rejoinder to
the replication
to the third
plea.

1854.

CHILTON
v.
CARRINGTON.

Demurrer.

respect of which sum the defendants held and were entitled to hold, and then held, and were entitled to hold the said lease as a security, as in the said agreement mentioned.

To this rejoinder the plaintiff demurred; the ground of demurrer being, that the agreement did not authorize the defendants to detain the lease as security for payment of rent or beer. Joinder in demurrer.



Aspland (with whom was *Byles*, Serjt.) in support of the demurrer. (a) The question arises upon the construction of the agreement set out in the plea,—whether it amounts to anything more than an agreement for the deposit of the lease as security for the 150*l.* and interest, or whether it authorises the defendants to sell the lease on default by the insolvent to pay his beer account. The defendants agreed not to call upon the insolvent for two years for re-payment of the principal sum secured by the note, provided the interest were duly paid in the meantime, and the rent of the premises, and also the money due upon the beer account; and, in the event of any of these conditions not being duly performed by the insolvent, the defendants were to be at liberty to demand the 150*l.* immediately, on giving fourteen days' notice, and, if the same were not paid, to sell the lease, and, in the event of the power of sale being exercised,

(a) The points marked for argument on the part of the plaintiff, were,—“That the last plea and rejoinder do not disclose any right in the defendants to detain or convert the lease: that the agreement set out in the plea gave no right to sell or dispose of the lease on account of money due to the lessor for rent, or on account of money due to the defendants

for beer: that, on the tender by the plaintiff of the amount of the note and interest, he became entitled to the possession of the lease: and that the plea and rejoinder, or one of them, should have shewn, in the terms of the agreement, that fourteen days' notice in writing was given, and that the note was put in force.”

—but not otherwise,—to deduct from the sum realised by such sale the principal, interest, and costs, and also what might be due to them on the beer account. The replication shews that no sale has taken place. It would be a most unreasonable construction of the agreement to hold the power of sale to extend to cover the beer account. The conditions only relate to the time at which the note is payable. [*Maule, J.* The whole office of the conditions, was, to restrain the defendants' right to sue upon the note.] Precisely so. [*Williams, J.* There would be no power to deduct arrears of rent, except in the event of a sale.] None. [*Maule, J.* The publican borrows 150*l.*, payable on demand. The parties agree, in substance, that, as long as the publican goes on paying his way, as to the interest, the rent of the premises, and the beer account, the brewers will not avail themselves of their right to demand payment of the note. That is no qualification of the publican's right to get back his lease, if he chooses to redeem it. If the parties so intended, I do not see why they should not have expressed that the lease was to be held by the brewers as a security for the rent and for the beer account, as well as for the 150*l.* and interest.]

1854.

CHILTON
v.
CARRINGTON.

Montague Smith, *contra*. The question is, whether the tender after the conditions broken, entitles the plaintiff to sue for the lease. Taking the whole agreement together, the lease is deposited with the defendants as a security for the due performance of the conditions: it gives them an inchoate right of sale, which is not divested by the tender that has been made. The plea alleges that all the conditions have been broken,—that the insolvent had not paid the 150*l.*, or performed the said agreement, and the said conditions thereof, or any of them: and the rejoinder states, that, at the time of the tender, a quarter's rent was in arrear, and that

1854.

CHILTON
v.
CARRINGTON.

37*l.* 9*s.* 6*d.* was due to the defendants for beer. The defendants, therefore, were in a condition to give the notice provided for by the agreement, and to proceed to a sale. [*Williams, J.* The agreement contemplates the possibility of an action being brought: the money may be paid even after notice, in order to defeat the power of sale. *Maule, J.* If the amount of the note and interest were paid, the insolvent would have been entitled to the note. The whole obligation as to the note being discharged, can the agreement be said to be a pledge of the lease for anything more?] The last clause, it is submitted, makes it a security for the beer account. [*Maule, J.* Yes, provided it comes to a sale. I think the parties have succeeded in expressing their intentions very clearly.] The plaintiff as assignee can only succeed on such rights as the insolvent has in law and equity. In the case of a pledge of a chattel, in equity the pawnor cannot redeem the pledge, except upon payment of the advance, as well as any debt which has become due from the pawnor to the pawnee whilst the chattel was in the hands of the latter. In Dr. Story's Equity Jurisprudence, 6th edit., Vol. 2, p. 392, § 1034, having in some preceding sections considered the difference between mortgages or pledges of real and of personal property, the learned author says,—“There is another consideration applicable to cases of mortgages and pledges of personal property, which does not apply, or at least is not as cogent, in cases of mortgages of land. The latter pass by formal conveyances; the former may be transferred by the mere change of possession. A subsequent advance made by a mortgagee or pledgee of chattels would attach by tacking to the property in favour of such mortgagee, when a like tacking might not be allowed in cases of real estate. Thus, for instance, in the case of a mortgage of real estate, the mortgagee cannot, as we have seen, compel the mort-

gagor, upon an application to redeem, to pay any debt subsequently contracted by him with, or advances made to him by, the mortgagee, unless such new debt or advances are distinctly agreed to be made upon the security of the mortgaged property. (a) But, in the case of a mortgage or pledge of chattels, the general rule, or at least the general presumption, seems the other way. For, it has been held, that, in such a case, without any distinct proof of any contract for that purpose, *the pledge may be held until the subsequent debt or advance is paid, as well as the original debt.* The ground of this distinction is, that he who seeks equity must do equity; and the plaintiff, seeking the assistance of the court, ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum, but upon the credit of the pledge which he had in his hands before. (b) The presumption may, indeed, be rebutted by circumstances: but, unless it is rebutted, it will generally, in favour of the lien, stand for verity against the pledgor himself, although not against his creditors, or against subsequent purchasers." (c) [*Williams, J.* That would seem to apply to a case where the property passes at law.] Here

1854.

CHILTON
v.
CARRINGTON.

(a) Citing *Mathews v. Cartwright*, 2 Atk. 347; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, 492, 494; *Shepherd v. Titley*, 2 Atk. 352, 354; *Anonymous*, 2 Ves. 662; *Lowthian v. Hasel*, 3 Bro. C. C. 162; *Jones v. Smith*, 2 Ves. jun. 376, 378; *Ex parte Knott*, 11 Ves. 617; 2 Fonbl. Eq. B. 3, Ch. 1, § 9, and note (u), § 12; *St. John v. Holford*, 1 Ch. Cas. 97; 4 Kent's Comm., Lect. 58, p. 185 (4th edit.)

(b) Citing *Demandray v. Metcalf*, Pre. Ch. 419, 420, 2

Vern. 691, 698, 1 Eq. Abr. 324, pl. 4, Gilb. Eq. Rep. 104; *Jones v. Smith*, 2 Ves. jun. 378, 379; *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Adams v. Claxton*, 6 Ves. 229; *Anonymous*, 2 Vern. 177; 2 Fonbl. Eq., B. 3, Ch. 1, § 10; 2 Kent's Comm., Lect. 40, p. 584 (3rd edit.); *Jarvis v. Rogers*, 15 Mass. R. (American) 389.

(c) Citing 2 Fonbl. Eq., B. 3, Ch. 1, § 11; 4 Kent's Comm. Lect. 58, p. 175, 176 (4th edit.).

1854.

 CHILTON
 v.
 CARRINGTON.

is a deposit of a lease, and a debt contracted by the insolvent with the party with whom the lease is deposited, whilst the chattel remained in his hands. [*Maule, J.* This is a debt particularly provided for by the terms of the agreement. You contend that a court of equity would impose terms different from those which the parties have thought fit to prescribe for themselves. Surely that cannot be so. Suppose a party has made two pledges, cannot he redeem one of them?] The obtaining an additional advance upon the security of the original pledge, would be more like the present case.

Apsland was not called upon to reply.

MAULE J. (a) For the reasons thrown out in the course of the argument, I think the true construction of the agreement in this case is, that the lease was deposited with the defendants by the insolvent as a security for the re-payment of 150*l.* and interest on a promissory note payable on demand. That undoubtedly is the main part of the transaction. Then comes a proviso restraining the defendants from enforcing immediate payment of the 150*l.* The security was intended to stand as long as the party should go on well. That, however, must have some limit. Accordingly, the defendants agree that they will not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what may from time to time be due to them for beer : and, if he fails in any of these respects, the defendants are to be at liberty, upon giving him fourteen days' notice, to sell the lease ; and, in the event of a sale,—and in that event only,—they are to deduct “all expenses attending such sale, together with the principal money and interest, *as also any ac-*

(a) The Lord Chief Justice was absent.

count that may be then due and owing for beer." So that the main part of the agreement consists of a pledge of the lease as a security for the payment of the amount of the note and interest, with a stipulation that the payees shall not enforce payment of the note for a given period, the maker duly performing certain conditions. All these are a mere qualification of the agreement not to enforce the immediate payment of the note, and are entirely ancillary to the payment of the note, or the defendants' right to enforce it. As soon as the maker had a right to demand the note back, all the conditions annexed to the agreement to forbear to enforce it failed: and incidentally to his title to the note, he would of course be entitled also to the securities lodged for its due payment. The moment the note was paid, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest. All fall to the ground, and cease to have any operation, as soon as the thing in respect of which they were provided ceases to exist: and the plaintiff, as the assignee of the maker, clearly had a right to maintain this action to recover back his security, on tender of all that was due upon the note. As to the supposed equitable claim, nothing has been cited on the part of the defendants to shew that the rights of the defendants would have been at all different if the question had arisen directly between them and Croft, the pledgor. No court of equity would have interfered with the right of the pledgor to have the note and the lease delivered up to him on payment or tender of the amount of the note and interest. I am of opinion that the plaintiff is clearly entitled to the judgment of the court upon this demurrer.

1854.

CHILTON
v.
CARRINGTON.

WILLIAMS, J. I am quite of the same opinion. The agreement set out in the plea is an agreement on the

1854. CHILTON
v.
CARRINGTON.

part of the insolvent, Croft, to deposit the lease sought to be recovered in this action, as a security for the payment, on demand, of the promissory note for 150*l.*, with interest. If that had been the whole agreement, there can be no doubt, that, at law, the insolvent would have been entitled to have the security re-delivered to him on payment of the sum advanced and interest. Is there, then, anything in the agreement which at all qualifies that right? It gives the pledgees a power to sell the lease, in case the pledgor should make default in the performance of certain conditions in the agreement mentioned, and in case the note should be fruitlessly put in suit against him after fourteen days' notice of such default. If a sale should take place pursuant to that power, then it is provided that the proceeds of the sale shall be charged with all the expenses which may have been incurred, together with the principal money and interest, and also any account that might be then due and owing for beer. That right has never arisen in this case, and therefore I am clearly of opinion that this action is maintainable.

CROWDER, J. The only question is, whether, upon the true construction of this agreement, the lease was deposited as a security for the note and interest only, or for any debt which Croft might incur with the defendants for beer supplied to him. The only argument in favour of the claim set up by the defendants, is that which is founded upon the last clause of the agreement, which enables them, in the event of their having exercised the power of sale conferred upon them by the earlier part, to apply the proceeds of such sale to the discharge, amongst other things, of the beer account. But, taking the whole of the instrument together, I think it was manifestly the intention of the parties that the deposit of the lease should enure only as a security for the pay-

ment of the note and interest, unless in the event of the insolvent being altogether sold up. I think the plaintiff is clearly entitled to our judgment.

1854.

CHILTON
v.
CARRINGTON.

Judgment for the plaintiff.

THOMAS MAYS and ANN MAYS v. CANNELL.

June 9.

THE declaration stated, that the plaintiffs brought, in the name of John Doe, a fictitious person, an action of ejectment in Her Majesty's court of Queen's Bench, before the 24th of October, 1852, to recover certain lands and premises; and, in the declaration in the said action, it was alleged that the now plaintiff Thomas Mays demised certain tenements to the said John Doe, and that the now plaintiff Ann Mays demised certain tenements to the said John Doe,—the tenements so alleged to have been demised by the plaintiffs respectively as aforesaid being the lands and premises for the recovery whereof the said action of ejectment was brought; in which action the now defendant became the defendant: That, while the said action of ejectment was pending, and after the defendant had become the defendant, a

An action of ejectment in which there were two several demises by A. and B., was referred,—with power to the arbitrator, “in the event of his finding for the lessors of the plaintiff,” to order immediate possession to be given of the land and premises in question in the action to the lessor of the plaintiff A., and also how and in what manner such possession should be given,

and, if not given, how it should be taken, and who should be at the expense thereof.

The arbitrator made his award as follows:—“I do award in favour of *the lessors of the plaintiff*, and do order that immediate possession be given of the land and premises in question in this action to the lessor of the plaintiff A., and that the defendant do consequently, and at his own proper cost and expense, pull or take down the wall or brick-work forming a gable-end of a long room, and which said wall or brick-work he has erected upon the land and premises of the said lessors, or so much of the said wall or brick-work as now stands four inches and a half, or thereabouts, over and upon the land and premises of the said lessors, and upon a certain wall or fence which divides the property of the said lessors from that of the defendant: And I do further award, that, should the defendant refuse to pull or take down the said wall or brick-work the subject of this action and reference, that the said lessors shall, by themselves or servants, have full power to pull or take down the said wall or brick-work in question, or so much thereof as aforesaid, and, if necessary for such purpose, to enter in and upon the premises of the said defendant, and that he shall pay and be answerable for all expense incurred in their so doing:”—

Held, that the award was not bad, for deciding “in favour of the lessors of the plaintiff;” and that it was sufficiently certain in the direction as to how and in what manner; and at whose expense, possession was to be given or taken.

1854.

MAYS
v.
CANNELL.

certain order was made in the said action, with the consent of the now plaintiffs and the now defendant, by Thomas, Lord Denman, then being Chief Justice of the said court of Queen's Bench, whereby, upon hearing the attorneys or agents on both sides, and by consent, the said judge did order that the said action of ejectment should be referred to the award, order, arbitrament, final end, and determination of W. C., Esq., barrister-at-law, who should make and publish his award in writing of and concerning the matter referred, ready to be delivered to the said parties in difference, or such of them as should require the same, or to either of them, or, if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same, on or before the first day of Michaelmas Term then next,—with power to enlarge the time, so that it should not be extended beyond the first day of Hilary Term then next; and, by the like consent he did thereby further order that the said parties should in all things abide by, perform, fulfil, and keep such award so to be made as aforesaid, and that the costs of the said action, and also the costs of the reference and award, should abide the event of the said award; and, by the like consent, the said judge did further order other things not material to the present claim, as in the said order appears: That the arbitrator did not make any award on or before the said first day of Hilary Term, but the said Lord Denman, then being such judge as aforesaid, did, by an order by him made, with the consent of the now plaintiffs and the now defendant, enlarge the time for making the award until the last day of Michaelmas Term, 1848: That, at the time of the making the last-mentioned order, in consideration that they, at the defendant's request, then consented to the said last-mentioned order being made, and promised the defendant to perform, abide by, and fulfil the said

first-mentioned order, as altered by the secondly-mentioned order as aforesaid, on their parts to be performed and fulfilled, the defendant promised the plaintiffs to perform, abide by, and fulfil the said first-mentioned order, as altered by the secondly-mentioned order as aforesaid, in all things on his part to be performed and fulfilled: That, after making the secondly-mentioned order, and before the last day of the said Michaelmas Term, 1848, the said W. C. made and published his award in writing of and concerning the premises referred to him as aforesaid, ready to be delivered to the said parties: That the event of the said award was altogether in favor of the plaintiffs, and that their costs of the said action, and of the reference and award, which were to abide the event of the said award, amounted to, and, according to the practice of the said court, were duly taxed at, the sum of 105*l.* 9*s.* 7*d.*, whereof the defendant had due notice: And that all things happened that were necessary to entitle the plaintiffs to have the said sum paid to them by the defendant: Yet that the defendant had made default, in this, that he had not paid the same, or any part thereof: And the plaintiffs claimed 200*l.*

1854.

MAYS
v.
CANNELL.

Fifth plea,—that, in the declaration in the action of Fifth plea.
ejectment mentioned in the declaration in this action, it was alleged that the plaintiff Thomas Mays had demised certain land covered with building, and certain other land, with the appurtenances, to the said John Doe, to hold the same to him and his assigns from thenceforth for a certain number of years, and that the plaintiff Ann Mays demised to the said John Doe certain land covered with building, and certain other land, with the appurtenances, to hold the same to the said John Doe and his assigns for a certain term of years; and that, by virtue of the said several demises, the said John Doe entered into the said several tenements above mentioned,

1854.

MAYS
v.
CANNELL.

with the respective appurtenances, and became and was possessed thereof for the said several terms so to him thereof respectively granted as aforesaid; and that, the said John Doe being so thereof possessed, the now defendant, afterwards, with force and arms &c., entered into the said several tenements, with the appurtenances, in which the said John Doe was so interested in manner and for the several terms aforesaid, which were not expired, and ejected the said John Doe from his said several farms, and other wrongs to the said John Doe the said now defendant then and there did, to the great damage of the said John Doe: That the tenements so alleged in the declaration in the said action of ejectment to have been demised by the plaintiffs respectively as aforesaid, were the lands and premises for the recovery whereof the said action of ejectment was brought: That, after the defendant had become the defendant in the said action of ejectment, and whilst the same was pending, he, the defendant, pleaded therein, and by his plea alleged that he was not guilty of the said supposed trespasses and ejectments laid to his charge, or either of them, or any part thereof, in manner and form as the said John Doe had complained against him, and of that the defendant put himself upon the country: That the plaintiffs, afterwards, and whilst the said action of ejectment was pending, did the like; and thereupon issue was joined in the said action of ejectment: That, afterwards, and after the said issue had been joined, and while the said action of ejectment was pending, the said order of reference in the declaration in this action mentioned was made in the same action, with the consent of the now plaintiffs and the now defendant, by the said Thomas, Lord Denman, the said Chief Justice, whereby, upon hearing the attornies or agents on both sides, the said judge did not only order as in the declaration in this action mentioned, but the said judge did also by the

like consent further order that the said arbitrator should, in the event of his finding in favour of the lessors of the plaintiff, have power to order immediate possession to be given of the land and premises in question in that action to the lessor of the plaintiff, the said Thomas Mays; and also how and in what manner such possession should be given, and, if not given, how it should be taken, and who should be at the expense thereof: That the said action of ejectment, and also the question whether the plaintiffs in the name of John Doe were entitled to recover in the said action of ejectment the land and premises for which the same action was brought, and also the said issue joined in the same action, were matters by the said agreement of reference referred, and were matters to be decided and awarded upon by the said arbitrator, and were matters in difference submitted to the said arbitrator; and that the said arbitrator was from time to time during the said reference required by the now defendant to decide the said action, and to arbitrate, adjudicate, and award in the same action, and to find specifically on the said issue in the said action, and to decide the said question whether the plaintiffs, in the name of the said John Doe, were entitled to recover in the said action of ejectment the lands and premises for which the same action was brought: That the award in writing of the said W. C. in the declaration in this action mentioned to have been made and published by him of and concerning the said premises referred to him as aforesaid, was and is in the words and figures following, that is to say,—“Whereas, an action of ejectment Award.

having been commenced in Her Majesty's court of Queen's Bench, in which John Doe on the demises of Thomas Mays and Ann Mays was plaintiff, and Annison Cannell defendant, it was, on the 17th of July, 1847, amongst other things, ordered by the Right Hon. Lord Denman, Chief Justice of the said court, by the consent

1854.

MAYS
v.
CANNELL.

1854.
MAYB
v.
CANNELL.

of both parties, that the said action should be referred to the award, order, arbitrament, final end, and determination of me, W. C., Esq., so as I the said arbitrator should make and publish my award in writing, ready to be delivered to the parties, or either of them, or, if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same, on or before the first day of Michaelmas Term then next ensuing; and, by the same consent, it was ordered that the costs of the said action, and also the costs of the reference and award, should abide the award, order, arbitrament, final end, and determination of me the said arbitrator, so to be made and published as aforesaid: And whereas, on the 21st of December next ensuing the date of the said order, and now last past, it was further ordered by the said Right Hon. Lord Denman, and by the consent of the attorneys or agents on both sides, that the time for me the said arbitrator making my award should be enlarged until the last day of Trinity Term then next ensuing: And whereas, on the 5th of June now last past, and previous to the said last day of the said Trinity Term, it was further ordered by the said Right Hon. Lord Denman, and by like consent of the said attorneys or agents, that the time for me, the said arbitrator, making my award should be further enlarged until the last day of Michaelmas Term now next ensuing: Now, I, the said arbitrator, having taken upon myself the burden of the said arbitration, and having heard and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before me by and on behalf of the said plaintiff and defendant respectively, in pursuance of the said reference, do make and publish this my award in writing of and concerning the said premises, following, that is to say, I do award in favour of the lessors of the plaintiff, and do order that

immediate possession be given of the land and premises in question in this action to the lessor of the plaintiff Thomas Mays; and that the said Annison Cannell, the defendant, do consequently, and at his own proper cost and expense, pull or take down the wall or brick-work forming a gable-end of a long room, and which said wall or brick-work he has erected upon the land and premises of the said lessors, *or so much of the said wall or brick-work as now stands four inches and a half, or thereabouts, over and upon the land and premises of the said lessors, and upon a certain wall or fence which divides the property of the said lessors from that of the defendant*: And I do further award, that, should the defendant refuse to pull or take down the said wall or brick-work, the subject of this action and reference, that the said lessors shall, by themselves or servants, have full power to pull or take down the said wall or brick-work in question, *or so much thereof as aforesaid*, and, if necessary for such purpose, to enter in and upon the premises of the defendant, and that he shall pay and be answerable for all expense incurred in their so doing: In witness, &c.:" And that the said award therein-before set forth, was the only award ever made in or of and concerning the premises above referred, or of any of them; and that there never was any other award ever made of or concerning the premises so referred; wherefore the defendant said that the said award was and is uncertain, and not final, and was wholly void.

The plaintiffs replied, that the said order of reference in the first count and fifth plea mentioned, was and is in the words, letters, and figures following, that is to say,—
 "Upon hearing the attorneys or agents on both sides, and by consent, I do order that this action of ejectment be referred to the award, order, arbitrament, final end, and determination of W. C., Esq., barrister-at-law, who

1854.

 MAYS
 v.
 CANNELL.

Replication to
the fifth plea.

1854. shall make and publish his award in writing of and concerning the matter referred, ready to be delivered to the said parties in difference, or such of them as shall require the same, or to either of them, or, if they or either of them shall be dead before the making of the said award, to their respective personal representatives who shall require the same, on or before the first day of Michaelmas Term now next: And, by the like consent, I do further order that the said arbitrator, in case he shall not be able to make his award in the premises by the time hereinbefore limited for that purpose, shall and may be at liberty, either with or without the consent of the said parties if he shall think fit, by writing under his hand, to enlarge the time for making his said award, so that it shall not be extended beyond the first day of Hilary Term now next: And, by the like consent, I do further order that the said parties shall in all things abide by, perform, fulfil, and keep such award so to be made as aforesaid, and that the costs of the said action, and also the costs of the reference and award, shall abide the event of the said award: And, by the like consent, I do further order that the said arbitrator shall be at liberty (if he shall think fit) to examine the said parties to this suit, and their respective witnesses, upon oath or affirmation, and that the said parties do and shall, if necessary, produce before the said arbitrator all books, deeds, papers, and writings, in their or either of their custody, possession, or power, touching or relating to the matter referred; and that each party do, upon the said reference, admit all deeds, grants, assignments, documents, letters, and copies of letters, and all other muniments of title, notices, and copies thereof, and all probates of wills, in evidence, as if they were the originals; and do admit in evidence all copies of surrenders or admissions, and other entries on court-rolls, on plain paper or parchment, unstamped, or otherwise; and all

MAYS
v.
CANNELL

certificates of baptism, marriage, and burial, and all extracts from baptismal, marriage, or burial books or registers, without further proof or production of the books from whence the said extracts are or purport to be taken, saving all just exceptions to the admissibility of all such documents, as evidence in this cause: And, by the like consent, I do further order that the said arbitrator shall have power, on the application of either party, either before, at, or after the said reference, to cause any amendment to be made in the pleadings in this action; and that, notwithstanding this order, either party shall be at liberty to apply to a judge of this court to make such amendment, or as to any admissions to be made on the said reference, and, in case of refusal, as to the costs of proof, but that neither party shall be compelled so to apply: And, by the like consent, I do further order that the said arbitrator shall, in the event of his finding in favour of the lessors of the plaintiff, have power to order immediate possession to be given of the land and premises in question in this action to the lessor of the plaintiff Thomas Mays; *and also how, and in what manner, such possession shall be given, and, if not given, how it shall be taken, and who shall be at the expense thereof*: And, by the like consent, I do further order, that, if any application be made to Her Majesty's court of Queen's Bench for the purpose of setting aside the said award, it shall be lawful for the said court to refer the matter back to the said arbitrator, who shall in that case have power to make a new award in the premises, or to amend the award by him first made, within such time as by the said court shall be ordered and directed in that behalf, and he shall have the same powers under the said reference from the court as are contained in the present order of reference; and that such new or amended award shall be binding upon the said parties as an award to be made under this order: And, by the like consent, I further

1854.

MAYS
v.
CANNELL.

1854.

MAYE
v.
CANNELL.

order that neither party shall bring or prosecute any action, &c.; and that, if either party shall, by affected delay, or otherwise, wilfully prevent the said arbitrator from making an award, he shall pay such costs to the other as the said arbitrator, or the said court of Queen's Bench, shall think reasonable and just: And, by the like consent, it is further ordered, that this order shall and may, at the instance of either party, be made a rule of Her Majesty's court of Queen's Bench, if such court shall so please: Dated, &c." And the plaintiffs said that they did not refer, or agree to refer, any matters or matter other than what is in and by the said order of reference, according to the legal effect thereof, agreed or ordered to be referred, or otherwise than in the manner and to the extent ordered in and by the said order of reference, according to the legal effect thereof, and the said order for the enlarging the time for making the said award, the legal effect of which last-mentioned order is stated in the first count; wherefore the plaintiffs said that the said award was and is certain and final and good.

Demurrer.

To this replication the defendant demurred; the grounds of demurrer stated, being,—“that the said replication attempts to plead matter of law; that, although the replication admits that the award set out in the fifth plea is the award declared on in the first count, yet the replication pleads no facts shewing any answer to the plea, or that the said award is certain and final; and that, upon the whole record, it appears that the said award is uncertain, and not final, and is void.”

Lush (with whom was *Palmer*), in support of the demurrer. (a) This was an ejectment with two demises,

(a) The points marked for defendant, were,—“That the argument on the part of the award set out in the pleadings

one by Thomas Mays, of "certain land covered with building, and certain *other land* with the appurtenances;" the other by Anne Mays, also of "certain land covered with building, and certain *other land*, with the appurtenances." The first objection to the award, is, that it is bad for uncertainty, in not shewing what land and premises the lessors of the plaintiff were entitled to recover, or how and in what manner the possession thereof was to be given or taken. [*Williams, J.* There is no averment in the plea that there is any doubt about it.] There is not. The subject was very much discussed in a case of *Stonehewer v. Farrar*, 6 Q. B. 730. There, an action for polluting the water of a watercourse was referred to an arbitrator, with power to him to regulate the enjoyment of the water: and it was held, that an award directing a verdict to be entered for the plaintiff, and that the defendant should at all times take *all proper and reasonable precautions* for preventing the water from being rendered unfit for the plaintiff's use, *and, in particular*, should use a process of filtering mentioned in the award, was bad for uncertainty. The direction as to the particular process, was, that the water passed

1854.

MAYS
v.
CANNELL.

is uncertain and not final, and therefore void, on the following grounds:

"1. That the award does not determine the action of ejectment referred, or whether the plaintiffs were entitled to recover in that action:

"2. That the words in the award, 'I do award in favour of the lessors of the plaintiff,' are ambiguous, and do not sufficiently determine the action of ejectment:

"3. That the award should have shewn how and in what manner the arbitrator found in

favour of the lessors of the plaintiff, and what land and premises they were entitled to recover, without which the arbitrator had no power to make any order as to giving possession:

"4. That it is uncertain from the award what were the lands of which possession was to be given, or how and in what manner such possession was to be given and taken:

"5. That the replication to the fifth plea pleads matter of law, and states no facts shewing the award to be final."

1854.

MAYE
v.
CANNELL.

from the defendant's to the plaintiff's premises should be passed through filtering lodges made or to be made by the defendant, so as to be thereby purified and cleansed for the plaintiff's use, "so far as the same can be purified and cleansed, *by the ordinary and most approved process* of filtering as aforesaid:" and it was held, that the description by reference only to the "ordinary and most approved process," was uncertain, and the award bad in that respect also. Lord Denman said: "The award is uncertain, as not describing or ascertaining the precautions which are to be taken. It states, first, that the defendant 'shall at all times take and use all proper and reasonable precautions and measures for the purpose' of preventing impurity in the water; and then it adds, 'and, in particular, I award and direct' that the contents of the dyeing vats shall be passed through filtering lodges, so as to be thereby purified for the plaintiff's benefit, 'so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as aforesaid.' Now, in this clause, when the award, affecting to give a direction as to the cleansing of the water, says that the defendant shall use all reasonable precautions, and follows that up by the words, 'and, in particular,' that the contents of the vats shall be passed, &c., it is just the same as if the particular direction were left out; for, although that were complied with, there may still remain something, alleged to be a direction of the arbitrator, the omission of which may become the subject of complaint, and ground for an attachment. I think we should leave an opening to much litigation and injustice if we held this general direction to be of any value. The particular words which follow are also too uncertain. The award speaks of the 'most approved process.' By whose approbation is that to be determined? The witnesses who have made affidavits say that they understand the direction; but even they do

not themselves state what, in their view, is the most approved method. It may be that the arbitrator risks the validity of his award, if he attempts to set out the process, and does it imperfectly: but much more is risked by the generality of description introduced here. The arbitrator must make himself scientifically master of the subject: he is bound to understand it so fully that he may make a statement on which no one can have a doubt, and that, when the material acts prescribed have been performed, it may be seen that the award is complied with, and parties may not be put to inquire for the greatest number of approvers. If dangers are to be considered, the most important is that which parties may incur, of acting upon awards which do not finally settle rights." Pat-teson, J., said: "It is assumed, that, if the award had stopped at the direction to use all proper and reasonable precautions and measures, that would have been sufficient: but I cannot conceive anything more likely to bring on future litigation than such a general mode of statement. Contradictory evidence might have been offered at any subsequent time on the reasonableness and propriety of the measures. It was the arbitrator's duty to state what they were to be." Coleridge, J., said: "It has been suggested, that, if the arbitrator has the choice of dictating a regulation or not, and lays down an imperfect one, it is not material. But I do not agree in this view. If the arbitrator goes wholly out of his jurisdiction, the award, on that point, is merely void, and need not be obeyed: but, if the direction be within the arbitrator's power, it binds, and ought to be clear in its terms. It is an expression sometimes used, that the court ought not to be astute in finding objections to awards: but I think the right rule extends to this, and no more, that we should construe them candidly and sensibly, in the same manner as other documents."

1854.

MAYS
v.
CANNELL.

1854.

MAYS
v.
CANNELL.

And Wightman, J., said: "An award ought to be so express that there should be no difficulty or doubt as to the performance." Here, the arbitrator awards in favour of the lessors of the plaintiff: and then he goes on,—“And I do order that immediate possession be given of the land and premises in question in this action to the lessor of the plaintiff Thomas Mays, and that the defendant do consequently, and at his own proper cost and expense, pull or take down the wall or brick-work forming a gable-end of a long room, and which said wall or brick-work he has erected upon the land and premises of the said lessors, *or so much of the said wall or brick-work as now stands four inches and a half, or thereabouts, over and upon the land and premises of the said lessors, and upon a certain wall or fence which divides the property of the said lessors from that of the said defendant*: And I do further award, that, should the defendant refuse to pull or take down the said wall or brick-work, the subject of this action and reference, that the said lessors shall, by themselves or servants, have full power to pull or take down the said wall or brick-work in question, or so much thereof as aforesaid, and, if necessary for such purpose, to enter in and upon the premises of the said defendant, and that he shall pay and be answerable for all expense incurred in their so doing.” [*Jervis*, C. J. Is it any objection to an award, that a stranger does not understand it?] It is submitted that it is. Here, it was obligatory on the arbitrator to define the premises, and to award distinctly and intelligibly how and in what manner the possession of the land in question was to be given up: and, if he were not bound to do so, having taken upon himself to do it, his award is bad, according to the authority of *Stonehewer v. Farrar*, if he does it imperfectly. It is essential that an award should be decisive and should bar all future litigation between the parties on the par-

ticular matters referred. [*Crowder, J. In Price v. Popkin*, 10 Ad. & E. 189, 2 P. & D. 304, on a submission of a cause and all matters in difference between lessor and lessee, an award that certain fixtures had been wrongfully removed by the lessor, to the value of 11*l.*, and that the lessee should set up others in their place, to be left for the lessor at the end of his term, and that the lessor should pay 11*l.* to the lessee on a specified day,—was held uncertain, for not specifying the value, quality, or description of fixtures to be set up by the lessee. That certainly is a very strong case. *Jervis, C. J.* Some of the cases upon the subject of awards run very wild indeed. In the case last referred to, the arbitrator had done what he ought not to have done, and had done that badly.] What does the arbitrator here mean by describing the quantity of brick-work to be pulled down, as “four inches and a half, or *thereabouts*?” Is there to be litigation hereafter as to the quantity taken down? The award is clearly bad for uncertainty.

The next ground of objection is, that the arbitrator does not state upon which demise he proceeds; nor does he dispose of the land *not* covered by building. That the award is faulty in both these respects, is shewn by the case of *Doe d. Madkins v. Horner*, 8 Ad. & E. 235, 3 N. & P. 344. There, ejectment being brought on two demises, all matters in difference in the cause were referred by a judge’s order, which directed that the costs of the suit and of the reference and award should abide the event of the award, that the party in whose favour the award should be might sign judgment in the same manner as if the cause had been tried at *nisi prius*, and that, if it was in the plaintiff’s favour, he might issue a writ of possession thereon, and proceed in the usual way for costs on such judgment: the arbitrator awarded that the plaintiff was entitled to the possession “of a certain part of the lands sought to be recovered,” which

1854.

MAYS
v.
CANNELL.

1854.

MAYE
v.
CANNELL.

he set out by boundaries: the award said nothing about the residue, nor did it say on which demise the plaintiff was entitled; and it gave no damages: and it was held, that the award was bad for not stating on which demise the plaintiff was entitled; and also for not expressly deciding as to the residue; but not for giving no damages. Littledale, J., said: "I think that when in ejectment, all matters in difference in the cause are referred, the arbitrator, after deciding as to one part, and so expressing himself, should do something as to the other. I do not say what he ought to do; whether he should set out the residue by metes and bounds, or may describe one part specifically, and then award as to the remainder in general terms. But I think his omitting of all mention of the remainder is not tantamount to deciding that the plaintiff has no title to it. On this ground, therefore, the rule must be made absolute. I think also that the arbitrator ought to have said on which of the two demises the plaintiff was entitled to recover." [*Jervis*, C. J. These absurd refinements shock one's common sense. *Williams*, J. In that case the award was in favour of John Doe: here it is in favour of "the lessors of the plaintiff."] That makes no difference. Patteson, J., in that case, said: "I also think the award bad for not shewing on which title the plaintiff has a right to the part named. The costs are to abide the event. But the award does not say on which demise the event is in favour of the plaintiff: it can hardly be so on both. It may be that some of this part is recoverable under one demise, some under the other; but, if so, that should be said: if the plaintiff recovers on one demise only, the defendants are entitled to costs on the other. We must, therefore, set this award aside, or at least do that which is tantamount to setting it aside. I agree that the court ought not to be astute in finding objections to an award." The principle

established in that case was still further carried out in *Doe d. Starling v. Hillen*, 2 Dowl. N. S. 694. A declaration in ejectment contained three demises; at the trial, a general verdict was taken, subject to a reference of the cause and all matters in difference, the costs of the cause to abide the event: the arbitrator having directed the general verdict to stand,—it was held, that the award was bad, for that the arbitrator was bound to state on which of the demises the plaintiff was entitled to succeed. *Doe d. Bowman v. Lewis*, 13 M. & W. 241, shews that the plea of not guilty, in ejectment, is distributable, and that the defendant is entitled to a verdict as to any part of the premises claimed in the action to which the lessor of the plaintiff fails to prove a title: and the reasons are given in a very elaborate judgment by Parke, B.

1854.

MAYB
v.
CANNELL.

Byles, Scrjt. (with whom was *Unthank*) contra. (a)

(a) The points marked for argument on the part of the plaintiff, were, — “That the award is good:

“That the words ‘I do award in favour of the lessors of the plaintiff’ are in themselves a sufficient award, and the subsequent matter may be rejected as surplusage:

“That, when certain matters are referred, and a power is in addition given to the arbitrator, it is not obligatory on him to exercise the power, nor is the award made bad by reason of an imperfect exercise of the power:

“That the order is to be deemed to be intelligible and possible to be obeyed, when applied to the locus in quo, or

when read by one who is acquainted with the locus in quo, as the defendant has not explained by his plea how it is that it is inapplicable or unintelligible or impossible to be obeyed; for, every intendment is to be made to support an award:

“That the ultimate allegation as to the award being uncertain, not final, and void, is not a sufficient explanation, but is a mere inference of law, which ought to be, but is not, supported by previous allegations:

“That, if such ultimate allegation is to be treated as an allegation of fact, then it is traversed at the end of the replication, and the defendant

1854.

MAYS
v.
CANNELL.

The court will not hold this award to be bad, unless they are prepared to say that in no conceivable case could it be a good one. If there be any difficulty in carrying it out, that may be shewn by affidavit for cause when the successful party seeks to enforce it by attachment, or by the aid of the statute 1 & 2 Vict. c. 110, s. 18. But that is not so where the proceeding is by action. This award is manifestly good upon the face of it. In the first place, the arbitrator has power to find in favour of "the lessors of the plaintiff;" and, in that event, he is to have power to order immediate possession to be given of the land and premises in question in the action to the lessor of the plaintiff Thomas Mays, and also how and in what manner such possession shall be given, and, if not given, how it shall be taken. There is nothing here to oblige the arbitrator to do more than find in favour of the lessors of the plaintiff. The award does so find: and then it goes on to direct the possession of the land and premises in question to be given to Thomas Mays, and that the defendant pull down the wall which he has erected upon the land and premises of the lessors, *or* so much thereof as stands four inches and a half, or thereabouts, over and upon the land and premises of the lessors. Inasmuch as there may be some difficulty in pulling down four inches and a half of the wall, the arbitrator gives the defendant the alternative, to pull down *the whole* of it. There can be no difficulty in that. [*Williams, J.*

should have tried it by a jury, instead of demurring:

"That the demurrer admits the award to be certain, final, and good, as alleged in the replication:

"That, even if the court cannot imagine a locus in quo and buildings to which the order in the award is pertinent and applicable, they are not

therefore to conclude that there can be none:

"That the order in the award is not bad for giving an alternative between two ways of giving possession, as the law gives the option to the defendant, who was to do the first act; and therefore the alternative produces no uncertainty."

Is not the *whole* wall stated to be erected on the premises of the lessors?] That is a little ambiguous: it may be satisfied by a wall built partly on their land. It may be that it is a latent ambiguity not yet raised by evidence. "The court ought not," as is said by Coleridge, J., in *Doe d. Madkins v. Horner*, "to be astute in finding objections to an award." [Williams, J. In some of the cases, it is said that judges ought to be astute in finding answers to objections.] It is said that the award is defective because it does not define the land. The arbitrator was not bound to define the land: he was only to decide how and in what manner possession was to be given or taken. He neither had power, nor was any obligation imposed on him, to define the land. In *Stonehewer v. Farrar*, 6 Q. B. 730, the reference was of all matters in difference: this is a reference of the action only. In *Doe d. Madkins v. Horner*, 8 Ad. & E. 235, 3 N. & P. 344, Coleridge, J., did not concur in the second ground of the decision; and the first point was decided upon the ground that the award did not say which party was to recover the land,—a defect from which this award at all events is free. Neither is there any such uncertainty in this award as there was in that in the case of *Doe d. Starling v. Hillen*, 2 Dowl. N. S. 694. As to the objection that the arbitrator has not decided upon which of the two demises the verdict is to be entered, that is answered by the recent case of *Law v. Blackburrow*, antè, Vol. XIV, p. 77. There, an action of ejectment, upon two several demises, was, after issue joined, referred by a judge's order, to the award of an unprofessional arbitrator,—the costs of the cause and of the reference and award to abide the event of the award. The arbitrator, professing to make his award "of and concerning the matter to him referred," ordered that "the verdict in the said cause should be entered for the lessors

1854.

MAYS
v.
CANNELL.

1854.

MAYS
v.
CANNELL.

of the plaintiff: "and the award was held sufficient. And Maule, J., said,—“As to there being two sets of lessors of the plaintiff, I am of opinion that the award sufficiently shews the intention of the arbitrator to be, to decide that the lessors of the plaintiff are entitled to succeed throughout the whole,—that the matters put in issue by the pleadings were all to be determined in favour of the lessors of the plaintiff.” [Williams, J. The arbitrator there had no power to order a verdict to be entered.] In *Wilcox v. Wilcox*, 4 Exch. 500, in an action of trover, to which the defendant pleaded, except as to a certain sum, not guilty, and not possessed, and as to that sum payment into court, a verdict was taken for the plaintiff for the amount of damages claimed, subject to an arbitration, and the arbitrator found generally that the verdict for the plaintiff was to stand, and that the damages were to be reduced to a certain sum: and it was held that the arbitrator had sufficiently disposed of all the issues. *Kilburn v. Kilburn*, 13 M. & W. 671, being there cited, Alderson, B., said: “That case, when properly considered, governs the present. It was there said by this court, in a well-considered judgment, that ‘the award must either dispose specifically of each issue raised on the record, or it must clearly be inferred from it in which way each of these issues has been found, so as to enable the officer to tax the costs for the party in whose favour each issue has been found.’ Here the arbitrator, although he has not disposed of each issue in so many words, has in reality done so; and that is sufficient.” And Parke, B., said: “The case of *Hobson v. Stewart*, 1 B. C. Rep. 288, is to the same effect, where my Brother Erle held that it was not necessary that the arbitrator should find upon each issue specifically, if he sufficiently disposes of them.” The award in question, it is submitted, is perfectly free from objection.

Lush, in reply. The objection here relied on was not prominently brought to the attention of the court in *Law v. Blackburrow*; neither were the cases of *Doe d. Madkins v. Horner*, and *Doe d. Sparling v. Hillen*, referred to: the whole of the argument was addressed to the power of the arbitrator to enter a *verdict*. [*Crowder*, J. Speaking of *Doe d. Madkins v. Horner*, in a case of *Harrison v. Creswick*, antè, Vol. XIII, p. 399, 417, Parke, B., says,—“The court held the award bad, for not deciding upon which demise the plaintiff was to recover, and also for not awarding as to the residue of the lands. It may, perhaps, be doubted whether an award in ejectment, which finds that the plaintiff is entitled to recover a portion only of the lands sought to be recovered, is not final: but clearly that case was correctly decided upon the other point.”] In *Stonehewer v. Farrar*, the court say that the very discussion of it shewed the award to be bad. [*Jervis*, C. J. I think we should always look favourably at awards, rather than be astute in criticising them. Is it not enough if the award is so framed that the parties cannot be misled by it?] The award should be so framed as to enable the parties at once to see what their relative rights and duties under it are. [*Williams*, J., referred to *Cargey v. Aitcheson*, 2 B. & C. 170, 3 D. & R. 433. (a)] This award is clearly bad: it professes to determine how much of the wall is on the land of the lessors of the plaintiff: the arbitrator therefore was bound to define it, and so settle the rights of the litigant parties.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court. This is an action of ejectment, with two demises. The cause is referred, the submission providing that the costs

(a) Affirmed in error, *Ait-cheson v. Cargey*, 13 Price, 639, 199, M'Clel. 367.

1854.

MAYS
v.
CANNELL.

1854.

MAYS
v.
CANNELL.

of the action, and also of the reference and award, shall abide the event of the award; and the first objection is, that the arbitrator has decided in favour of the lessors of the plaintiff, without saying upon which demise, and so he has not fully disposed of the costs. In support of this objection, two cases, of *Doe d. Madkins v. Horner*, 8 Ad. & E. 235, 3 N. & P. 344, and *Doe d. Starling v. Hillen*, 2 Dowl. N. S. 694, were relied on by Mr. Lush, where the court of Queen's Bench, professing an anxiety not to be astute in discovering objections to the award, yet upheld an objection of the very strictest and most technical description. It is possible, however, that those decisions may have been perfectly correct. But my Brother Byles has referred us to a very recent authority in this court, which is expressly in point, viz. *Law v. Blackburn*. That also was an action of ejectment with two demises; and the arbitrator having ordered that "the verdict in the said cause should be entered for the lessors of the plaintiff," my Brother Maule, expressing himself in very strong language, held the award to be good and conclusive in that respect. It is true that the cases of *Doe d. Madkins v. Horner* and *Doe d. Starling v. Hillen* were not brought to the notice of the court on that occasion. But the decision is very express; and we must hold ourselves bound by it, and therefore determine that the award in question is sufficiently certain in this respect.

The other point is this:—The arbitrator was by the submission to decide the cause: but he was likewise empowered, in the event of his finding in favour of the lessors for the plaintiff, to order immediate possession to be given of the land and premises in question in the action to the lessor of the plaintiff Thomas Mays, and also how and in what manner such possession should be given, and, if not given, how it should be taken, and who should be at the expense thereof. He has chosen to exercise that power; and, in so

doing, it is said he has made a mistake which renders his award uncertain and void. He awards in favour of the lessors of the plaintiff, and orders that immediate possession be given of the land and premises in question in the action to the lessor of the plaintiff Thomas Mays. So far the award is certain. The arbitrator then goes on to direct that the defendant, "at his own proper cost and expense, pull or take down the wall or brick-work forming a gable-end of a long room, and which said wall or brick-work he has erected upon the land and premises of the said lessors, or so much of the said wall or brick-work as now stands four inches and a half, or thereabouts, over and upon the land and premises of the said lessors, and upon a certain wall or fence which divides the property of the said lessors from that of the defendant." Several cases were cited by Mr. Lush to shew that awards in this alternative shape have been held uncertain and informal. But we rather incline to agree with my Brother Byles, that the court ought not to struggle to make an award uncertain; but, that, if upon any reasonable construction the award can be sustained, it ought to be sustained. In the present case, I think we may reasonably assume that there was a wall dividing the property of the lessors of the plaintiff from that of the defendant, and that the defendant built his gable-end upon that wall; and, the arbitrator, considering it a party-wall, and that, being a nine-inch wall, four inches and a half of it would be erected on the land of the lessors of the plaintiff, the wall might fairly be considered as a wall standing upon the lessors' land. The arbitrator therefore directs the defendant to pull down the wall, or so much thereof as stands upon the land of the lessors of the plaintiff, as near to the four inches and a half as can be adjusted. We therefore think the award is reasonably certain, and that consequently the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

1854.

MAYS
v.
CANNELL.

1854.

HOPKINS v. TANQUERAY.

May 27.

A. sent his horse to Tattersall's for sale by public auction, where he was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable, and seeing him in the act of examining the horse's legs, A. said,—“You have nothing to look for: I assure you he is perfectly sound in every respect;” whereupon, B. replied, “If you say so, I am perfectly satisfied,” and, upon the faith of the representation so made to him by A.,—which was admitted to have been made in perfect good faith,—became the purchaser:—Held, that there was no evidence of *warranty* to go to a jury,—the representation made by A. on the day preceding the auction forming no part of the contract of sale.

Quære, per Maule, J., as

to the legality of such a secret bargain for a warranty, where third persons attending the sale are bidding upon the supposition that the sale is without warranty.

THIS was an action for an alleged breach of warranty on the sale of a horse.

The declaration stated that the defendant, by falsely and fraudulently representing and warranting a horse to be then sound, sold the said horse to the plaintiff, yet that the said horse was not then sound, as the defendant then knew, and that, by reason of the premises, the plaintiff was put to expence, &c., &c.

Pleas,—first, not guilty,—secondly, that the horse, at the time of the making of the promise in the declaration mentioned, was sound. Issue thereon.

The cause was tried before Talfourd, J., at the sittings at Westminster after last Hilary Term. The facts which appeared in evidence were as follows:—In May, 1853, the defendant sent his horse “California,” for which he had in 1851 given 250 guineas, with a warranty of soundness, to Tattersall's for sale, and accordingly it was advertised, with several others, to be sold without reserve on Monday, the 30th. On the morning of Sunday, the 29th, the defendant, upon going into the stables at Tattersall's, saw the plaintiff (with whom he was acquainted) kneeling down in the stall examining California's legs, whereupon he said to him,—“You need not examine his legs; you have nothing to look for: I assure you he is perfectly sound in every respect;” to which the plaintiff replied, “If you say so, I am perfectly satisfied,” and immediately got up. On the following day the plaintiff attended the auction, and purchased California for 280 guineas,—having, as he said, “made up his mind on the 29th of May, to buy him, relying on the defend-

ant's positive assurance that he was sound." Mr. Tattersall, who was called as a witness, proved that the well known course of business at his establishment was, that horses sold there were not warranted unless so stated in the catalogue; and that California was not warranted. The horse was subsequently put into the hands of a trainer, when he was found to be unsound; and, after some correspondence between the parties, the plaintiff sold him for 144 guineas, and now sought by this action to recover the difference between that sum and the sum at which he had purchased the horse.

On the part of the defendant, it was insisted that the conversation between the plaintiff and defendant on the day preceding the sale, was a mere representation as to the opinion and belief of the defendant, and did not amount to a warranty,—that it was a mere representation, which, if unfounded, gave no ground of action, in the absence of fraud,—that it was no part of the contract,—that a sale by auction differed in this respect from a private sale,—and that the representation could not be incorporated into the contract, it having been made on Sunday.

The learned judge declined to nonsuit the plaintiff, although he expressed a doubt whether there was any evidence of warranty at all. And, in answer to questions put to them by the learned judge, the jury found, first, that a warranty was embodied in the contract of sale,—secondly (though as to this the evidence was conflicting), that California was unsound at the time of the sale.

A verdict was accordingly found for the plaintiff, damages 142*l.* 16*s.*,—leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence of warranty to go to the jury.

Lush, in Easter Term last, obtained a rule nisi accordingly.

1854.

HOPKINS
v.
TANQUERAY.

1854.

HOPKINS
v.
TANQUERAY.

Byles, Serjt., *Hawkins*, and *Finlason*, now shewed cause. There was abundant evidence of a warranty to go to the jury. The scienter is not a material part of the declaration, and need not be proved,—*Williamson v. Allison*, 2 East, 446: and there is no imputation of fraud. But it is submitted that the statement made by the defendant when he met the plaintiff at the stable on the day preceding the day of sale, was intended by him as a warranty of soundness, and was so understood and acted upon by the plaintiff. [*Maule*, J. If that had been part of the negotiation which ended in a purchase, perhaps what passed upon that occasion might amount to a warranty. But, can you tack on a previous private communication to what is said by the auctioneer at the time of the actual sale, in order to constitute a warranty? To permit such a practice of warranting to an individual, would be to encourage a fraud upon all the others attending the sale; like putting up sham bidders.] No particular words are necessary to constitute a warranty. In *Cave v. Coleman*, 3 M. & R. 2, it was held that a verbal representation by the seller to the buyer, in the course of dealing, that he “may depend upon it the horse is perfectly quiet and free from vice,” amounts to a warranty. In the course of the argument, it being contended that there had been nothing more than a mere representation in the course of the dealing, couched in phrases such as are always used by a seller towards a purchaser, Bayley, J., said,—“But that representation was, that the horse was quiet and free from vice, and, being made in the course of dealing, and before the bargain was complete, it amounted to a warranty.” And Lord Tenterden, in giving judgment, said: “I think it clear that the proof of warranty was sufficient to support the declaration. The parties are dealing, and the seller says, ‘You may depend upon it that the horse is perfectly quiet, and

free from vice.' That is a very sufficient warranty, though the word *warrant* was not used." That is precisely like this case: it shews that a representation made in the course of the dealing, is the same as if the word "warrant" or "promise" had been used. So, in *Solomon v. Ward*, 2 C. & P. 211, letters passing between the plaintiff and defendant, in which the plaintiff wrote, "You well remember that you represented the horse to me as a five-year-old," &c., to which the defendant answered, "The horse is as I represented it," were held to be sufficient evidence from which the jury might infer that a warranty was given at the time of the sale; and that it was not necessary to give other proof of what actually passed when the contract was made. Best, C. J., in his summing up, says: "No particular form of words is necessary to constitute a warranty. If it were so, there would be more tricks in horse causes than there are at present. If a man says, 'this horse is sound,' that is a warranty. The plaintiff in his letter says, 'You remember you represented the horse to me as a five-year-old;' to which the defendant's answer is, 'The horse is as I represented it.' Now, if the jury find that this occurred at the time of the sale, and without any qualification, then I am of opinion that it is a warranty. If it occurred before, or if it was qualified, then it must be taken to be a representation, and not a warranty." His lordship then left the case to the jury, telling them, that, if they found that the defendant at the sale gave an undertaking to the effect mentioned in the letters, then, in his opinion, such undertaking was a warranty: and a verdict was found for the plaintiff. Here, the representation as to the soundness of the horse, was made with reference to an intended purchase, and in fact formed part of the contract. In *Wood v. Smith*, 5 M. & R. 124, 4 C. & P. 45, upon the sale of a mare, the defendant said, "I

1854.

 HOPKINS
 v.
 TANQUEBAY.

1854.

HOPKINS

v.

TANQUERAY.

believe the mare to be sound, but I will not warrant her;" and Lord Tenterden ruled that this, being a representation made at the time of sale, that the mare was sound to the best of the vendor's knowledge, was part of the contract: and the plaintiff had a verdict, which the court afterwards refused to disturb. [*Maule*, J. I presume nobody will deny here, that, if the auctioneer had said at the time of the sale, "the horse is sound in every respect," that would have been a warranty. The contract here, I take it, commenced when the horse was put up by the auctioneer, and ended when he was knocked down to the plaintiff.] Then, is it any objection that the representation was made *before* the actual contract. In *Lysney v. Selby*, 2 Lord Raym. 1118,—where the representation was before the sale,—Lord Holt says: "If upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because *the warranty is the ground of the treaty*, and this is warrantizando vendidit. But it is otherwise, if the warranty be after the sale; as, if a man sells goods, and afterwards warrants them, such (R. contrà, *Stuart v. Wilkins*, Dougl. 18) a warranty is not good. But, in the other case, the warranty is part of the contract." So, in *Parsley v. Freeman*, 3 T. R. 51, 59, Buller, J., says: "In 1 Rolle Abr. 95, l. 25, it is said, if any servant lease my land to another for years, reserving a rent to me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances; if the land be incumbered, &c., the lessee may have an action on the

case against my servant, because he made an express warranty. Here, then, is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425 (a), but no notice is taken of this point; probably because the reporter thought it immaterial whether the warranty be by the master or servant. And, *if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases.*" That which took place between the parties on the Sunday may be treated as a conditional contract, which became absolute when the plaintiff became the purchaser of the horse at the auction on the following day; as in the cases referred to by Maule, J., in *The Fishmongers' Company v. Robertson*, 5 M. & G. 176, where he says,— "There is a large class of cases mentioned by Pothier (b), where one party, A., promises to do something, if another party, B., will do something else. This contract is not binding on B.: but, if he does the act, then it becomes binding on B." It is every day's experience that matter preceding the actual contract may be incorporated with it; as in *Syers v. Jonas*, 2 Exch. 111, where an established usage in the tobacco trade that all goods are sold by sample, though not so expressed in the bought and sold-notes, was held admissible. So, in *Bartlett v. Purnell*, 4 Ad. & E. 792, 6 N. & M. 299, it was held, that a written document, from which a particular contract would in ordinary cases be implied, may be shewn by parol to have been made under circumstances which exclude such implication: therefore, where a party to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should

1854.

HOPKINS
v.
TANQUERAY.
(a) *Broking v. Cham.* And Jac. 630.see *Southern v. How*, Cro. Jac.(b) *Traité des Obligations*,
468; *Pope v. Lewyns*, Cro. Part II., Ch. 3.

1854.
HOPKINS
v.
TANQUERAY.

be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer,—it was held, that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. And Lord Denman said: “The jury must be taken to have found that the bargain related to the goods purchased at the sale, subject to the opinion of the court whether the bargain could be given in evidence. I do not see why it should not, *as it took place before the auction.*” [Maule, J. There is this difficulty about that. Assuming that the defendant privately warranted his horse to the plaintiff before the sale, a very serious question would arise whether such a warranty could be enforced,—bonâ fide bidders, to whom the horse was not warranted, might thus be induced to offer a higher price, supposing the plaintiff to be bidding upon the same footing as themselves. That sort of double dealing could hardly have been intended by either of these gentlemen. Each would, in effect, be taking the chance of an advantage at the expense of third persons. Jervis, C. J. It might be a ground for setting aside the sale, as between the seller and a third person. Crowder, J. Your argument must have been precisely the same, if Mr. Tattersall had, at the time of putting up the horse, distinctly said,—“This horse is sold without a warranty.”] Doubtless it must. At all events, it was for the jury to say whether or not there had been a warranty: and, if there was any evidence for them, the court will not say they have come to a wrong conclusion. In *Power v. Barham*, 4 Ad. & E. 473, 6 N. & M. 62, 7 C. & P. 356, 1 M. & Rob. 507, in assumpsit for breach of a warranty of pictures, it was proved, amongst other things, that the defendant, at the time of sale, gave the purchaser a bill of parcels, describing the pictures thus,—“Four pictures; Views in

Venice: Canaletti: 160*l*." The judge left it to the jury, upon this and the rest of the evidence, to say whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion. The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty: and it was held, that the question had been rightly left to the jury, and that the verdict could not be disturbed; Littledale, J., saying,—“The case was rightly left to the jury, although, as to their decision, I think that all the auctioneers in London would be alarmed if they thought that such words as these were to be understood as a warranty:” and Williams, J.,—“The words in question might be a mere expression of opinion, or might amount to a warranty: *it was for the jury to say which they imported.*” Besides, there was evidence here, that the defendant at a subsequent period admitted, that, in the conversation which took place on the day before the sale, he had said enough to imply a warranty. [*Jervis*, C. J. That amounts to no more than an admission that he had said all that was proved. He was mistaken in supposing it to amount to a warranty.] With respect to the representation having been made on a Sunday,—[*Jervis*, C. J. There is nothing in that.]

1854.

HOPKINS
v.
TANQUERAY.

Edwin James, and *Lush*, who were to have argued in support of the rule, were not called upon.

JERVIS, C. J. I am of opinion that the rule to enter a nonsuit in this case must be made absolute. No doubt, there is no necessity that the word “warrant” or “promise” should occur in the bargain. That was decided in *Cave v. Coleman*, 3 M. & R. 2, where it was held that a verbal representation by the seller to the buyer, in the course of dealing, that he “may depend upon it the

1854.

HOPKINS

v.

TANQUERAY.

horse is perfectly quiet and free from vice," is a warranty. Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain: if it be part of the contract, it matters not at what period of the negotiation it is made. A case of *Bartlett v. Purnell*, 4 Ad. & E. 792, 6 N. & M. 299, was cited for the purpose of shewing that what was said by the defendant on the Sunday amounted to a warranty, and that the fact of the subsequent sale having taken place in a different mode, viz. by auction, was unimportant. That case, however, when examined, will be found not to establish any such proposition: it is true the parties there made a collateral bargain that the goods which the defendant might purchase should be set against a debt due to him from the owner of the goods. It might have been another matter, if the *auctioneer* had been suing; though, possibly, as agent of both parties, he would have been bound by the equities existing between them. That case, therefore, does not establish that you may alter the nature or character of a contract by a previous bargain. Whether, assuming what was said in this case prior to the sale, to have amounted to a warranty, such warranty would under the circumstances have been binding between the parties, I give no opinion, because I think it is quite clear that what passed amounted to a *representation* only, and not to a *warranty*. The facts were simply these:—The defendant seeing the plaintiff in the stable on the Sunday prior to the sale, examining the horse's legs, said to him,—“You need not examine his legs: you have nothing to look for: I assure you he is perfectly sound in every respect:” to which the plaintiff replied, “If you say so, I am satisfied.” The plaintiff made no further examination; and he did not employ a veterinary surgeon, relying upon a representation made by an honourable man. The defendant, doubtless, believed the

horse to be as he represented it: no fraud is imputed to him: on the contrary, indeed, the plaintiff expressly disclaims it. There is, consequently, no basis on which to rest this action. On the day following, Mr. Tattersall announces that he is about to sell California without a warranty: and the defendant becomes the purchaser. It seems to me to be perfectly clear, that, in what took place between them on the Sunday, the defendant did not mean to warrant the horse, but was merely making a representation of that which he bonâ fide believed to be the fact; and that the plaintiff so understood it. What passed afterwards cannot in any degree affect the case: it only amounts to this, that the parties thought at one time that there had been a warranty. I think the rule must be made absolute.

1854.

 HOPKINS
v.
TANQUERAY.

MAULE, J. I also am of opinion that the rule to enter a nonsuit in this case must be made absolute, the event in which the leave for that purpose was reserved having arisen, viz. that there was no evidence to go to the jury that the horse was sold with a warranty. That there was no warranty at the time of the actual sale, is perfectly clear; for, it was shewn to be the course of dealing at Tattersall's, that no horse is sold with a warranty unless it is expressly mentioned; and this has been dealt with as a case in which no mention of warranty was made at the time of the sale. The question, then, is, whether we can import a warranty of soundness, as between the plaintiff and the defendant, from that which took place at Tattersall's on the day preceding the auction,—a conversation pointing towards a sale of the horse. It appears that the plaintiff and defendant met at Tattersall's on the Sunday morning; and that the plaintiff knelt down to examine the horse's legs, when the defendant said, "You need not look: I assure you he is perfectly sound in every respect:" whereupon the

1854.
HOPKINS
v.
TANQUERAY.

plaintiff, desisting from the inspection, observed,—“If you say so, I am perfectly satisfied.” It has been contended on the part of the plaintiff, that this was evidence from which the jury would be warranted in inferring that the parties were making that a part of the bargain. But I do not think there is the smallest ground upon which the jury could infer that the parties intended or understood from what passed upon that occasion that the defendant would be liable to an action if the horse turned out to be unsound. That some parties may have thought that it amounted to a warranty, proves only that they attach to a warranty something which does not properly belong to it. The evidence, properly understood, and appreciated, amounts to no more than this, that the defendant was believed to be a gentleman of veracity, as well as of skill in horses, and the plaintiff was about to examine the horse in question, as persons who are, or affect to be, very knowing usually perform that operation, when the defendant says to him, “You need not take the trouble to examine my horse to ascertain if there is any defect that may be seen or felt: he is perfectly sound.” That is a clear representation: and, if it were made with intent to deceive, the defendant would undoubtedly be liable. That, however, is not only not insinuated, but actually disclaimed on the part of the plaintiff, and I think very properly. There appears to have been no more than an honest representation that the horse in the defendant’s opinion, and so far as his knowledge went, was a perfectly sound horse. There is nothing whatever to shew that the representation was one that was to subject the defendant to a liability to pay damages in the event of the horse proving to be unsound,—nothing to shew that the defendant meant more than what he actually did say on the occasion. The fact of that conversation passing between the plaintiff and the defendant at the time when it was known

to both that the sale was to take place by public competition on the following day, affords to my mind a very strong reason for thinking that the defendant could not have intended what he then said to be imported as a warranty into the transaction. If there be any ambiguity, that affords an additional presumption that that conversation was not intended for a warranty. I therefore think there was no evidence to go to the jury, and consequently that a nonsuit must be entered pursuant to the leave reserved. It is unnecessary to say anything as to the other point which was thrown out in the course of the argument.

1854.

 HOPKINS
 v.
 TANQUERAY.

CRESSWELL, J. The only question upon which it is necessary to pronounce any opinion here, is, whether there was any evidence of a warranty which could properly be submitted to the jury. I am clearly of opinion that there was not. The only contract which was made between the parties, was made on the Monday: and there was no warranty given then. A conversation took place between the parties at the stable on the previous day. Was there anything there to shew that the contract between the plaintiff and defendant was to be different in any respect from that on which the horse was offered to the rest of the public? There certainly was no express warranty. Is it to be implied? If the representation made at the stable on the Sunday had been made at the time of the sale, so as to form part of the contract, it might have amounted to a warranty. But, though the defendant made a representation that the horse was sound, he did not thereby mean at all to vary the contract to be entered into at the auction on the following day. When the defendant afterwards admitted that he did say what amounts to a warranty, he evidently did not mean to admit a formal contract of

1854. warranty at the time of the sale. There was no evidence of actual warranty.

HOPKINS

v.

TANQUERAY.

CROWDER, J. I am of the same opinion. The conversation which took place between the parties on the Sunday was a mere representation, and was evidently not made with an intention to warrant the horse. A representation, to constitute a warranty, must be shewn to have been intended to form part of the contract. I think it abundantly clear upon the evidence that the matter here relied on was not understood or intended as forming part of the contract which might be made at the auction on the following day, which it was well known to both parties would be without a warranty. It was a mere representation, quite distinct from any intention to warrant the animal. It is unnecessary to consider whether a party may lawfully warrant as between himself and a particular individual under circumstances like these. It is a very grave question whether such a contract could be upheld in a court of justice, in the case of a sale by auction, where all have a right to suppose they are bidding upon equal terms.

Rule absolute for a nonsuit.

May 27.

DORRETT and others v. SIR H. MEUX and Another.

A copy (unstamped) of the Act Book of the Ecclesiastical Court is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14.

THIS was an action of ejectment by remaindermen, to recover possession of a public-house and premises, called the Blue Boar, in Great Russell Street, Bloomsbury.

At the trial, before Crowder, J., at the sittings at Westminster after the last term, in order to shew, as part of their title, that one Peacock had by will conveyed a lease of the premises in question to one Hitchins,

the plaintiffs' counsel put in a *copy* of the Act Book of the Ecclesiastical Court. It was objected, for the defendants, that this copy was not admissible. The learned judge, however, received it; and, a verdict having been found for the plaintiffs, and several points reserved,

1854.

 DORRETT
v.
MEUX.

Bullar now moved to enter a nonsuit, or for a new trial, contending, amongst other things, that the *copy* of the Act Book was not admissible, not being rendered evidence by the 14 & 15 Vict. c. 99, the 14th section of which enacts, that, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted; and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding 4*d.* for every folio of ninety words." The copy of the Act Book was no proof of the will. [*Cresswell*, J. The plaintiffs were not seeking to prove the will; but merely to prove that a certain person was the executor named in the will.] The book itself might be good evidence for that purpose, but not a copy. [*Jervis*, C. J. Is not the Act Book a "book of such a public nature as to be admissible in evidence on its mere production from the proper custody?" *Crowder*, J. The document offered was an "examined

1854.

 DORRETT
 v.
 MEUX.

copy." *Jervis*, C. J. It was clearly admissible under the act.] The Act Book itself is but a copy; and the best copy is the only evidence. [*Jervis*, C. J. There is no such thing as a best copy.] No evidence was offered to excuse the absence of the probate. [*Maule*, J. If the Act Book itself would be evidence, the examined copy would also be so under the statute.] If these copies are to be received as evidence, the revenue will be defrauded. [*Maule*, J. Some such argument was urged in *Slatterie v. Pooley*, 6 M. & W. 664. Be it so.] It is submitted that this is not the best evidence.

JERVIS, C. J. I think there is no ground for a rule. It is admitted, that, before the passing of the 14 & 15 Vict. c. 99, the Act Book would be admissible evidence to prove what was here required: and the 14th section says, that, whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, &c., provided it be proved to be an examined copy or extract, and purport to be duly certified as such. There is nothing in the objection.

The rest of the court concurring,

Rule refused.

1854.

BUCKLAND v. JOHNSON.

June 7.

THE plaintiff declared for money had and received, goods sold and delivered, and money found due upon an account stated, and also "for that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods.

The defendant pleaded,—first, except as to the last count, never indebted.

Secondly, as to the last count, not guilty.

Thirdly, as to the last count, that the goods, moneys, and bank-notes therein mentioned were not, nor was any or either of them, or any part thereof, the plaintiff's.

Fourthly,—as to so much of the declaration as related to money payable for money received by the defendant to the plaintiff's use, and to the said household furniture, glass, linen, china, books, and plate,—that the said [money was money received for, and as, and being the proceeds of the sale of the goods in the last count and

To a count for money had and received, the defendant pleaded, that the "said debt for money received became due from, and was contracted by, the defendant jointly with A., and not by the defendant alone, nor by the two jointly and severally, but only jointly;" that, after the accruing of the causes of action in the count mentioned, the plaintiff sued A. for money had and received and in trover, and recovered a judgment against him for 100*l.* and costs; and that the causes

of action in respect of which the plaintiff so recovered that judgment against A. included all the causes of action to which that plea was pleaded.

It appeared in evidence, that the defendant and A. had wrongfully converted the goods of the plaintiff, by selling them; that the proceeds of the sale (150*l.*) were received by the defendant alone; and that the plaintiff had sued A., and recovered a verdict for 100*l.*, as the value of the goods so converted; but that, in consequence of A.'s insolvency, he had obtained no satisfaction.

Upon its being objected, at the trial of this action, that these facts did not sustain the plea, the judge allowed the defendant to amend by substituting for the words above in inverted commas, the following, "the said money was money received for and as being the proceeds of the sale of the goods in the last count and hereinafter mentioned:"—

Held,—that the amendment was properly allowed, though the judge imposed no terms on the defendant,—and that the amended plea afforded a complete answer to the claim of the plaintiff in this action.

Seemle,—per Jervis, C.J.,—that a judgment in trover vests the property in the goods in the defendant, from the time of the conversion.

1854.
 BUCKLALD
 v.
 JOHNSON.
 Fourth plea.

hereinafter mentioned*], and that the grievances in the last count mentioned, so far as they related to the said household furniture, glass, linen, china, books, and plate, were committed by the defendant and the said Thomas Barber Johnson jointly, and not by the defendant alone, which said Thomas Barber Johnson, at and from the time of the accruing of the causes of action to which this plea was pleaded, until and at the time of the recovery of the judgment thereafter mentioned, was with the defendant jointly liable to the plaintiff for the said causes of action: That, after the accruing of the causes of action to which that plea was pleaded, and before that action, the now plaintiff commenced, in the court of our lady the Queen before Her justices at Westminster, commonly called the court of Common Pleas at Westminster, an action at law against the said Thomas Barber Johnson, and by his declaration in that action the now plaintiff declared, and said, amongst other things, that he sued the said Thomas Barber Johnson for money payable by the said Thomas Barber Johnson to the plaintiff for money received by the said Thomas Barber Johnson to the plaintiff's use; and for that the said Thomas Barber Johnson converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, household furniture, household utensils, books, and pictures; and the plaintiff by his said declaration in that action claimed 500*l.*: That such proceedings were thereupon had in the said court in that action, that afterwards, and before this action, the plaintiff recovered against the

* The words within brackets were inserted, by way of amendment, in substitution of the following:—"debt for money received became due from, and was contracted by, the defend-

ant jointly with Thomas Barber Johnson, and not by the defendant alone, nor by the two jointly and severally, but only jointly."

said Thomas Barber Johnson, for and in respect of, amongst other things, his said claim for money payable to him by the said Thomas Barber Johnson, and for the said conversion to the said Thomas Barber Johnson's own use, and the said wrongful deprivation of the plaintiff of the use and possession of the said household furniture, household utensils, and books by the said Thomas Barber Johnson, the sum of 100*l.*, with 136*l.* for costs of suit: That the said household furniture, household utensils, and books in the declaration in the said other action mentioned as aforesaid, were and are *the same identical goods* as the said goods which in the declaration in this action were described as household furniture, glass, linen, china, books, and plate; and that the conversion and deprivation thereof, whereof the plaintiff in the said other action complained as aforesaid, was and is the same as the conversion and deprivation thereof whereof in this action he had in his declaration complained, and to which this plea was pleaded; and that the said claim in the said other action in respect of money payable for money received, included the plaintiff's said claim in this action for money payable for money received, and to which the plea was pleaded: And that the causes of action whereof the plaintiff in his declaration in the other action so complained as aforesaid, and in respect of which, amongst other things, he so as aforesaid recovered the said judgment, *included all the causes of action to which this plea was pleaded*,—which judgment remained on record in the said court.

Fifth plea, as to the last count so far as it related to the moneys and bank-notes, that the defendant, so as in the last count mentioned converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the said moneys and bank-notes, not alone, but jointly with the said Thomas Barber Johnson, and in such way as that he and the said Thomas Barber John-

1854.

 BUCKLAND
 v.
 JOHNSON.

Fifth plea.

1854.
BUCKLAND
v.
JOHNSON.

son thereby became, at the election of the plaintiff, to be treated as and converted into joint-debtors to the said plaintiff, to the amount of the said moneys and bank-notes, as for money received by them to the use of the plaintiff, if the plaintiff should elect to waive the said tort in respect of the said moneys and bank-notes, and should waive the same: That, afterwards, and before this action, the plaintiff did elect to waive, and in pursuance of such election did waive, the said tort; whereupon and whereby the defendant and the said Thomas Barber Johnson became, to the amount of the said moneys and bank-notes, joint-debtors to the plaintiff for money received by them to his use, and thereupon, before this action, the plaintiff commenced in the said court of Common Pleas the said other action in the next preceding plea mentioned, and therein declared as in that plea mentioned, and before this action recovered the judgment in the next preceding plea mentioned: And that the said claim in the said other action for money payable for money received, included all the plaintiff's claim for the said debt for money received in which the defendant and the said Thomas Barber Johnson became jointly indebted to the plaintiff by reason of the waiver of the said tort as aforesaid,—which judgment remained on record in the said court.

The plaintiff replied taking issue upon the first, second, and third pleas, and to the fourth and fifth replied nul tiel record.

The cause was tried before Williams, J., at the first sitting at Westminster in this term. The facts which appeared in evidence were as follows:—

The plaintiff had advanced money to the amount of 249*l.* to one Midgeley, and on the 29th of May, 1852, to secure those advances, Midgeley executed to him a bill of sale of his household furniture. Midgeley afterwards made a second bill of sale of the same goods to one

Perkins, to whom he was indebted to the amount of 148*l*. Perkins, having seized the goods under his bill of sale, employed the defendant, who was an auctioneer, to sell them.

1854.

 BUCKLAND
 v.
 JOHNSON.

It appeared that there were two Johnsons,—William Johnson, the father, and Thomas Barber Johnson, the son,—but it did not distinctly appear whether they carried on business in partnership, or whether the son acted as the agent or servant of his father.

The goods were sold by Thomas Barber Johnson; but the father, William Johnson, the now defendant, was in the auction-room while the sale was going on, and he received the proceeds, amounting to 150*l*., and, notwithstanding a notice from the plaintiff not to part with the money, paid with it Parker's demand of 148*l*. The plaintiff, not then knowing that the now defendant had received the money, sued Thomas Barber Johnson for money had and received, and for the conversion, and obtained a verdict and judgment against him for 100*l*. and 136*l*. costs: but the suit produced no fruits, Thomas Barber Johnson having taken the benefit of the insolvent debtors act, and therefore this action was brought against William Johnson, the father.

On the part of the plaintiff, it was objected that the facts proved did not sustain the fourth plea, the money having been received by the now defendant only, and not by the father and son jointly; and that the plaintiff was at all events entitled to recover upon the count for money had and received, notwithstanding there might have been a conversion by the two.

The learned judge inclining to think this argument well founded, the defendant's counsel asked leave to abandon the plea, and plead *de novo*. The learned judge having declined to allow this, he was then asked to permit the plea to be amended, by striking out the words, "the said debt for money received became due

1854. from, and was contracted by, the defendant jointly with
BUCKLAND Thomas Barber Johnson, and not by the defendant
v. alone, nor by the two jointly and severally, but only
JOHNSON. jointly," and substituting for them the following,—
"the said money was money received for and as being
the proceeds of the sale of the goods in the last count
and hereinafter mentioned."

It was then insisted by the defendant's counsel, that the recovery in the action against Thomas Barber Johnson was a bar to an action against the now defendant either for the conversion of the same goods, or for the recovery of the proceeds thereof.

The learned judge left the case to the jury, who found that the plea as amended was proved; and accordingly his lordship directed a verdict to be entered for the defendant, reserving leave to the plaintiff to enter a verdict for 148*l.* 15*s.*, if the court should be of opinion that the amendment was improperly allowed, or the plea as amended afforded no defence; and the court to say, if they thought the amendment ought to have been made, what terms, if any, should have been imposed.

Byles, Serjt., on a former day in this term, moved for a rule nisi accordingly. [*Maule*, J. The plaintiff has already sued Thomas Barber Johnson, and recovered a judgment against him for the wrongful conversion of the goods in question. It appears, therefore, upon record that the goods were wrongfully converted. The plaintiff now says that the goods were *not* wrongfully converted, but were sold with his consent and authority. The defendant answers,—“No: you cannot be permitted now to say that; for, it is agreed and settled between us that it *was* a wrongful conversion.” Suppose, after the recovery in the action against Thomas Barber Johnson, the money, the proceeds of the sale, had been received by *him*, could the plaintiff have brought another action

against him, for money had and received?] Probably not. [*Maule*, J. Then, how can he maintain such an action against the now defendant?] That presents a totally different question. The now defendant is no party to the record in the former action.

A rule nisi having been granted,

1854.

BUCKLAND
v.
JOHNSON.

Lush now shewed cause. The amendment was properly made. It had been supposed, that, as both father and son were present and acting in the sale of the goods, both had received the money; but, as it turned out upon the evidence given at the trial that, though both acted in the sale, the proceeds were received by the father only, the amendment was asked for, in order to make the plea fit the facts as proved. The amendment did not in any degree vary the issue the parties went down to try. [*Maule*, J. The conversion consisted of a sale by the two. Suppose two persons jointly sell goods to a third, and the buyer pays the price to one of them, is not that a payment to both?] It is submitted that it is. The amendment did not really alter the matter in contest between the parties; and it clearly was within the competence of the learned judge.

Then, it is said that the plea is a bad one, as amended. It is perfectly clear that a party having a right of action for a conversion, may waive the tort, and sue for money had and received; but, if he recovers in an action for money had and received, such recovery would be a bar to an action of trover against the same or another defendant; and vice versa. It is also clear, that, where there are two joint tort-feasors, a judgment recovered against one of them, may be set up as a bar to an action against the other. There are distinct authorities in support of both these propositions. In *Brown v. Wootton*, Cro. Jac. 73, in trover for plate, the defendant pleaded, that the plaintiff had brought an action for the

1854.

BUCKLAND
v.
JOHNSON.

same goods against J. S., supposing the conversion to have been by him, and that he had recovered judgment against J. S., and taken him in execution,—averring that the second action was for the same goods, and for the same trover and conversion. Upon demurrer, it was objected that the plea was bad, being pleaded without satisfaction; and the case was put of “debt against two by several præcipes upon obligation, judgment and execution against one is no plea for the other, without satisfaction; and execution of the body is no satisfaction.” But the court held the plea to be good: “for, the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to certainty; which takes away the action against the others: and therefore Popham said, if one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *è contrà*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the alleging that he hath the one in execution for this cause, is not an answer to the purpose: and the difference betwixt this case and the case of debt upon an obligation against two, is, because there every of them is chargeable, and liable to the entire debt; and therefore a recovery against one is no bar against the other, until satisfaction. Fenner said, that, in case of trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again.” That shews that a second action of trover cannot be maintained. In *Kitchen v. Campbell*, 3 Wils. 304, 2 Sir W. Bla. 827, the court, in giving judgment, says,—“We are of opinion that the plaintiffs, having brought *trover* in this court in Michaelmas Term,

1769, against the sheriff of Surrey and the now defendant, to recover the value of the goods of the bankrupt taken in execution (which action well laid), *have made their election*; and, there being a verdict and judgment upon record in that action against the plaintiffs, they are barred for ever from having the present or any other action: for, you shall not bring the same cause of action twice to a final determination: *Nemo debet bis vexari*: upon this we found our judgment." [*Cresswell*, J. A recovery in trover would be no answer to an action for goods sold and delivered.] No: but it would be to money had and received. The plaintiff might have sued both father and son in the former action. [*Maule*, J. Does it operate as an estoppel?] No: it is recovery,—satisfaction. Even in matter of debt, a judgment recovered in an action against one joint-debtor, is a bar to an action against the other. This was decided in *King v. Hoare*, 13 M. & W. 494. Parke, B., in giving the judgment of the court, there says,—“It is remarkable that this question should never have been actually decided in the courts of this country. There have been, apparently, conflicting dicta upon it. Lord Tenterden, in the case of *Walters v. Smith*, 2 B. & Ad. 892, is reported to have said that a mere judgment against one would not be a defence for another. My Brother Maule stated, in that of *Bell v. Banks*, 3 M. & G. 267, 3 Scott, N. R. 497, that a security by one of two joint-debtors would merge the remedy against both. In the case of *Lechmere v. Fletcher*, 1 C. & M. 634, Bayley, B., strongly intimates the opinion of the court of Exchequer, that the judgment against the one was a bar for both of two joint-debtors; though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle, and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the

1854.

 BUCKLAND
 v.
 JOHNSON.

1854.
 BUCKLAND
 v.
 JOHNSON.

plea is good. If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim 'transit in rem judicatam,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus, it has been held, that, if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause: *Brown v. Wootton*. And, though, in the report in Yelverton, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet, upon a comparison of all the reports (a), it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham states the true ground."

At all events, the amendment was one which might properly be made under the 15 & 16 Vict. c. 75, s. 222: and as it in no degree varied the issue the parties went down to try, there was no reason for imposing terms.

(a) See Yelverton, 67, F. Moore, 762.

Hawkins and *Finlason*, in support of the rule. The original and the amended plea clearly do not present the same defence. The proof failed because the money was not received by Thomas Barber Johnson, but by the now defendant. [*Jervis*, C. J. You knew that all along, and therefore could not be taken by surprise.] We might have demurred to the amended plea. [*Maule*, J. Probably you would have asked to have been allowed to plead and demur. *Cresswell*, J. The substance of the plea as it now stands, is, that the plaintiff recovered against the son in trover for the conversion of the same goods, and therefore he cannot recover against the father in an action for the proceeds. The original plea set up two defences,—a joint conversion by the two, and a receipt of the money by the two. In the amended plea, the defendant abandons the joint receipt of the money,—an allegation of a fact which he could not prove.] The plea as it now stands was not sustained by the evidence. [*Lush*. That point was not reserved: it was taken for granted that the plea as amended was proved. [*Jervis*, C. J. No question was put to the jury. My Brother Williams reports, that, the amendment being made, my Brother Byles withdrew.]

The plea is clearly bad as it now stands. It nowhere appears on the face of it that the conversion in respect of which the plaintiff recovered against Thomas Barber Johnson, was a conversion by sale of the goods, so as to connect the receipt of the money now sought to be recovered with that conversion. It alleges that "the money in question was money received for and as and being the proceeds of the sale of the goods in the last count and thereafter mentioned." The defendant was bound to shew in his plea that the sale of the goods was the conversion complained of. He goes on to allege that the grievances in the last count mentioned, so far as they relate to the said household goods, &c., were committed

1854.

 BUCKLAND
 v.
 JOHNSON.

1854.
 BUCKLAND
 v.
 JOHNSON.

by the defendant and the said Thomas Barber Johnson, jointly, and not "by the defendant alone,"—not saying in what respect,—“and that, after the accruing of the causes of action to which this plea is pleaded, and before this action, the now plaintiff commenced an action against Thomas Barber Johnson” for money had and received, and for a wrongful conversion of the plaintiff’s goods, and recovered for and in respect of his claim for money payable to him by Thomas Barber Johnson, and for the said conversion, 100*l.*, and costs: and then the plea concludes with an averment that the goods mentioned in the declaration in each action were the same, and the causes of action the same. It is not alleged that the money received by the defendant was the proceeds of the conversion of these very goods. [*Crowder*, J. Can any body doubt that the sale was the conversion? *Jervis*, C. J. If this objection had been presented at the trial, it would, if there be anything in it, have been obviated at once. The judgment in trover changes the property.] Not the judgment alone, but the judgment and satisfaction: *Cooper v. Shepherd*, ante, Vol. III, p. 266. [*Jervis*, C. J. There it happened that the money had been paid.] The present case is clearly distinguishable from *Brown v. Wootton*, and also from *King v. Hoare*. *Brown v. Wootton* is an authority merely for this,—that, if there be one joint cause of action only against two persons, a judgment obtained against one of them is a bar to a recovery against the other in a second action for the same cause: and the reason given, is, because “the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, to a certainty, which takes away the action against the others:” and therefore it is that Popham, C. J., says, that, “if one hath cause of action against two, and ob-

tain judgment against one, he shall not have remedy against the other." But, in the present case there are two distinct and separate causes of action: the evidence would necessarily be essentially different; and the damages *might* be different. Besides, the plea is in confession and avoidance, and there is an admission of money had and received by the defendant to the use of the plaintiff. [*Maule, J.* The plaintiff has made the goods the goods of Thomas Barber Johnson by the recovery.] *Cooper v. Shepherd* is an authority to the contrary. [*Jervis, C. J. Adams v. Broughton, Andrews, 18, 2 Stra. 1078, (a)* seems to be a very distinct authority to shew that the property is changed by the recovery in the former action. There, the plaintiff had brought trover against one Mason, wherein he obtained judgment by default, and afterwards had final judgment; whereupon a writ of error was brought. He then brought another action of trover against Broughton, for the same goods for which the first action was brought against Mason. Strange moved, on an affidavit that the goods converted amounted to more than 10*l.*, that the defendant might be held to special bail, and he urged, in answer to an objection made by Page, J., that, by a judgment obtained by the plaintiff in trover, the goods are become the defendant's,—that a special property only is thereby vested in him; and, in the present case, it is evidence only of a property as between the plaintiff and Mason, *but not as between the present parties.* But the court said: "The property of the goods is entirely altered by the judgment obtained against Mason; and

1854.

 BUCKLAND
 v.
 JOHNSON.

(a) "Lou home ad biens en action de detinue pur ceux
 come un trespassor, et cestuy a biens il serra a luy bone title a
 que le trespas est fait recover les biens per cest recoverie,"
 damages pur les biens, cest Per Frowike, J., Keilwey.,
 amends en damages done a le 58. b.
 trespassor droit a les biens, et

1854.

BUCKLAND
v.
JOHNSON.

the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world." And therefore the motion was denied. You have a higher remedy,—on the judgment; as is put by my Brother Parke, in *King v. Hoare*, 13 M. & W. 494.] That might be so, if trover had been brought against both. But the cause of action in respect of which the plaintiff has recovered a judgment against Thomas Barber Johnson, is separate and distinct from the cause of action now sought to be enforced against the present defendant. The recovery against Thomas Barber Johnson was less by 50*l.* than the value proved in the present action: the plaintiff is, at all events, entitled to the difference. [*Maule, J.* Recovery is universal. We must assume that the verdict in the first action was given for the full value of the goods converted. *Jervis, C. J.*, referred to *Lacon v. Barnard*, Cro. Car. 35, where it was held, by Hutton, Harvey, and Croke, that recovery in *trespass* for taking and driving away a flock of (eighty-nine) sheep, and small damages (2*d.*) given, was no bar to *trover* for the same sheep, if the plaintiff reply that the recovery was only for the *taking*, and not for the *value*,—*Yelverton*, however, holding, that, "because the action of trespass is cepit et abduxit, therefore it includes that the defendant had them, and ousted the plaintiff of the possession: and, although the damages be small, it shall be intended to be given for the sheep; and, if so, then he cannot have an action for converting them afterwards."] That shews that the plaintiff should have been allowed at the trial to amend his replication. [*Maule, J.* The proceeds of the sale of the goods and the goods themselves must be taken to be identical in value. In *Put v. Rawsterne*, Sir T. Raym. 472, the plaintiff brought trover for goods. The defendants pleaded an action of trespass vi et armis brought

against them formerly for taking and disposing of the same goods; and, upon not guilty pleaded, a verdict was found for the defendants; judgment *si actio*. The plaintiff demurred; and adjudged for the plaintiff in this action of trover, "because trover and trespass are actions sometimes of a different nature; for, trover will sometimes lie where trespass *vi et armis* will not lie: as, if a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover, but not trespass *vi et armis*, because here was no tortious taking: and sometimes the case may be such that either the one or the other will lie; as, where there is a tortious taking away of goods, and detaining them, the party may have either trover or trespass, and in such case judgment in one action is a bar in the other. And the rule for this purpose is, that wheresoever the same evidence will maintain both the actions, there the recovery of judgment in one may be pleaded in bar of the other; but otherwise not: and so this judgment will not clash with *Ferrer's Case*, 6 Co. Rep. 7, a., which is good in law, for here it is to be presumed that the plaintiffs in the first action had mistaken their action, for that they had brought a trespass *vi et armis*, whereas they had no evidence to prove a wrongful taking, but only a demand and denial, and therefore the verdict passed against them in that action, and so were forced to begin in this new action of trover." And the learned reporter adds,—“This judgment was given positively by Pemberton, Jones, and myself; Dolben, *hæsitante*.” In *Hitchin v. Campbell*, as reported in 3 Wils. 240, 2 Sir W. Blac. 779, to assumpsit for money had and received by the defendant to the use of the plaintiff, the defendant pleaded in bar “that the plaintiff heretofore brought an action of trover against him and one A. B., to recover damages against them for divers

1854.

 BUCKLAND
 v.
 JOHNSON.

1854.
 BUCKLAND
 v.
 JOHNSON.

goods and chattels of the plaintiff supposed to be converted by them to their own use; to which they pleaded the general issue, and a verdict was found for them (the defendants), and judgment was entered thereupon, which the present defendant now pleaded in bar to this action, and averred that the goods and chattels for which the action in trover was brought, are the very same identical goods for the produce thereof (by sale) the present action is brought by the plaintiff against the defendant for money had and received for the plaintiff's use." And, upon demurrer, "the whole court, without much debate, were clear of opinion that a judgment for the defendant in trover is no bar to an action for money had and received by the defendant for the use of the plaintiff." [*Jervis*, C. J. There, the recovery in the former action was by the defendants. Here, the recovery by Buckland in the former action of trover against Thomas Barber Johnson makes the goods the goods of Thomas Barber Johnson by relation to the time of the conversion. The goods, therefore, which the present defendant sold, were the goods of Thomas Barber Johnson.]

JERVIS, C. J. I am of opinion that this rule should be discharged. I think the plea was properly amended; and I think it was substantially proved as amended. I also think that the objections to the amendment which have been now urged by Mr. Hawkins, should have been urged at the time, when, if there were anything in them, they might have been removed by a further amendment. There can be no doubt that the plea as amended was proved in substance: and I think it is equally clear that my Brother Williams was quite right in allowing the amendment. The question which was substantially in issue between the parties, and which both went down to try, was, not whether the proceeds of the sale of the plaintiff's goods had been received by the defendant

1854.

 BUCKLAND
 v.
 JOHNSON.

and his son jointly, but whether there had been a substantial recovery by the plaintiff in the former action, so as to bar his right to recover in this. As, therefore, the amendment raised substantially the real point in controversy between the parties, I do not think it ought to have been allowed only upon the terms of the defendant's paying the costs of the day. The sole remaining question, then, is, whether the plea as amended affords an answer to the action. I think it does. The authorities shew,—and indeed it is not denied,—that, if Thomas Barber Johnson, the son, had received the money as well as converted the goods, and Buckland had sued him in trover, and obtained a judgment against him, even though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. Upon the same principle, if two jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received to recover the value of the goods, for which a judgment has already passed in the former action. Mr. Finlason says, that, as the plaintiff recovered only 100*l.* in the action against Thomas Barber Johnson, and the present defendant received 150*l.* as the value of the goods, the plea should at all events only be considered as a bar to the extent of 100*l.*: and for this he relies on *Hitchin v. Campbell*, 3 Wils. 240, 2 Sir W. Blac. 779. That case, however, does not sustain the position for which it was cited. It was an action for money had and received by the defendant for the use of the plaintiff; to which the defendant pleaded in bar, that the plaintiff had brought an action of trover against him and one A. B. to recover damages against him for divers goods and chattels of the plaintiff supposed to be converted by them to their own use, to which they pleaded the general

1854.

BUCKLAND

v.

JOHNSON.

issue, and a verdict was found for them (the defendants), and judgment was entered thereupon, which the present defendant now pleaded in bar to this action, and averred that the goods and chattels for which the action in trover was brought were the very same identical goods for the produce whereof (by sale) the present action was brought by the plaintiff against the defendant for money had and received for the plaintiff's use: and, upon demurrer, the court held that a judgment for *the defendant* in trover is no bar to an action for money had and received by the defendant for the use of the plaintiff. As the verdict for the defendants in the action of trover might have gone upon the ground that the sale of the goods took place with the plaintiff's authority,—which, though it would negative the alleged conversion, would be no answer whatever to an action for money had and received,—that case is obviously no authority on the present occasion. The whole fallacy of the plaintiff's argument arises from his losing sight of the fact, that, by the judgment in the action of trover, the property in the goods was changed, by relation, from the time of the conversion; and that, consequently, the goods from that moment became the goods of Thomas Barber Johnson; and that, when the now defendant received the proceeds of the sale, he received his son's money, the property in the goods being then in him. Some of the authorities do, indeed, seem to lay it down that it is not the recovery only, but the recovery coupled with the payment of the damages, that changes the property. Thus, in *Cooper v. Shepherd*, antè, Vol. III, p. 272, Tindal, C. J., delivering the judgment of the court, says: "The plaintiff in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost; and, after he has once received the full value, he is not entitled to further compensation in respect of the same loss: and, according to the doctrine of the cases

which were cited in the argument, by a former recovery in trover, *and payment of the damages*, the plaintiff's right of property is barred, and the property vests in the defendant in that action: see *Adams v. Broughton*, 2 Stra. 1078, and *Jenkins*, 4th Cent., Case 88, where it is laid down, 'A., in trespass against B. for taking a horse, recovers damages: by this recovery, *and execution done thereon*, the property in the horse is vested in B. *Solutio pretii emptionis loco habetur.*' But, in the fuller report of *Adams v. Broughton* in *Andrews*, 18,—where an action of trover had been brought by Adams against one Mason, wherein he obtained judgment by default, and afterwards had final judgment, whereupon a writ of error was brought; and another action of trover was afterwards brought by Adams for the same goods for which the first action was brought, against Broughton,—the court, upon a motion to hold the defendant in the second action to bail, distinctly lay it down that "the property of the goods is entirely altered *by the judgment* obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world." By "*damages recovered*," the court evidently did not mean "*paid*," for a writ of error was then pending in the first action. And this is explained by the principle laid down by my Brother Parke, in *King v. Hoare*, 13 M. & W. 504,—“If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem

1854.

 BUCKLAND
 v.
 JOHNSON.

1854.

 BUCKLAND
 v.
 JOHNSON.

judicatam,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus, it has been held, that if two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause: *Brown v. Wootton*, Yelv. 67, Cro. Jac. 73, F. Moore, 762. And though, in the report in Yelverton, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet, upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham,—Cro. Jac. 74,—states the true ground: he says,—‘If one hath judgment to recover in trespass against *one*, and damages are certain,’ (that is, converted into certainty by the judgment), ‘although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *à contrà*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other: and the difference betwixt this case and the case of debt and obligation against two, is, because there every of them is chargeable, and liable to the entire debt; and, therefore, a recovery against one is no bar against the other until satisfaction.’ And it is quite clear that the chief justice was referring to the case of a joint and *several* obligation, both from the argument of the counsel, as reported in Cro. Jac., and the statement of the case in Yelverton. We do not think that the case of a joint contract can, in this respect, be

distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is *for the same cause of action.*"(a) The right of action is merged in the judgment. It is the *judgment* that disposes of the matter, and not the payment.

1854.

 BUCKLAND
v.
JOHNSON.

MAULE, J. I also am of opinion that this rule should be discharged, and that the case was a very proper one for amendment at the trial. The amendment asked for and allowed did not alter the substance of the plea, or in any degree vary that which was the real question in controversy between the parties, viz. whether the plaintiff had recovered against one of two joint tort-feasors, so as to make that recovery a bar to a subsequent action against the other. That question was raised by the plea as it originally stood; and it was also raised by the plea as amended. I do not think it was at all a case for the imposition of terms upon the defendant. Every plea is to be taken subject to such amendments as the law as it now stands permits the judge to make. Then the plea as amended seems to me to be a good plea; and, being proved, afforded a good defence to the action. It states, in substance, that the money sought to be recovered in this action was the proceeds of certain goods of the plaintiff which the now defendant and Thomas Barber Johnson had jointly converted, and that the plaintiff had sued Thomas Barber Johnson for that conversion, and recovered a verdict against him for 100*l.*, the value of the goods so converted. That seems to me to afford a substantial answer to the action. In an action of

(a) And see the judgment of Bayley, B., in *Lechmere v. Fletcher*, 1 C. & M. 623.

1854.

BUCKLAND
v.
JOHNSON.

trover, the plaintiff may not always recover the full value of the thing converted: and, if it had been shewn here that the plaintiff had not recovered the full value of the goods in question in the former action, I will not say what the consequences might have been. But here we must take it that the plaintiff did recover the full value in the former action. Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has obtained a verdict and judgment. He has, therefore, got what the law considers equivalent to payment, viz. a judgment for the full value of the goods. It appears upon the plea and upon the evidence, that the sum actually received by the present defendant as the proceeds of the sale exceeded the amount for which the plaintiff recovered judgment in the former action. But, when the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury. The circumstance of the present defendant's having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone: his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all. For these reasons, I think the rule should be discharged.

CRESSWELL, J. I am of the same opinion upon both points, and for the reasons already given. As to the suggestion thrown out, that the plaintiff ought to be allowed to recover the difference between the value of the goods as fixed by the verdict in the former action of trover, and the sum received by the present defendant as

the proceeds of the sale,—I think there is no foundation whatever for it. The plaintiff had his election to treat the conversion as a wrongful act, and recover the value of the goods at the time of the sale, in an action of trover, or to adopt the sale as an act done with his sanction, and sue for the proceeds, as for money had and received to his use. Having elected the former course, he is bound by it, and cannot in a new action claim any part of the proceeds.

1854.

BUCKLAND
v.
JOHNSON.

CROWDER, J. I am entirely of the same opinion. The case clearly was a proper one for an amendment. The substance of the issue which the parties went down to try, was, whether or not the judgment in the former action against Thomas Barber Johnson, which had produced no fruits to the plaintiff, was a bar to the present action. The plea as originally framed alleged that the proceeds of the sale were received by Thomas Barber Johnson and the present defendant jointly, and it turned out upon the evidence that they were received by the defendant alone. The amendment therefore was asked for, and was I think properly allowed without the imposition of any terms. Then comes the question whether the plea as amended is a good bar to the action. It appears to me that it is, on the grounds stated by my Lord and my Brother Maule. The plaintiff having a cause of action, in trover or for money had and received, at his election, against two, has brought trover against one, and recovered judgment against him. It happens that that judgment is for 100*l.* only, and that the other party, the now defendant, actually received 148*l.* as the proceeds of the goods converted: and therefore it is contended that the recovery in the former action is no bar as to 48*l.* The circumstance, however, of the two amounts being different is a mere accident, which cannot alter the principle upon which our judgment proceeds,—which is, that

1854.

BUCKLAND
v.
JOHNSON.

the plaintiff, having made his election to sue for the tort, and having recovered what the jury considered the value of the goods at the time of the conversion, cannot now bring money had and received in respect of the same cause of action.

Rule discharged.

JENKINS, Clerk, v. EDWARD BETHAM and GEORGE BETHAM.

Jan. 31, 1855.

One who holds himself out as a valuer of ecclesiastical property, though he is not bound to possess a precise and accurate knowledge of the law respecting the valuation of dilapidations as between outgoing and incoming incumbent, is bound to bring to the performance of the duty he undertakes a knowledge of the general rules applicable to the subject, and of the broad distinction which exists between the cases of a valuation as between incoming and outgoing tenant, and a valuation as between incoming and outgoing incumbent.

THIS was an action against the defendants as surveyors and valuers of ecclesiastical property, for alleged ignorance and want of due skill in the exercise of their profession.

The declaration stated, that one Matthew Hodge, deceased, was up to and at the time of his death rector of the parish of Fillingham, in the county of Lincoln, and was also seised, in right of the said rectory, of and in (amongst other things) a certain messuage called the Rectory House, and the outhouses and gardens thereunto belonging, and, being so seised as aforesaid, afterwards died; and the plaintiff afterwards, and after the death of the said Matthew Hodge, and before the retainer and employment of the defendants thereafter mentioned, was in due form of law presented, admitted, instituted, and inducted into the rectory aforesaid, so void by the death of the said Matthew Hodge as aforesaid, and thereby then became and was, and still is, rector of the said parish church, and the next successor of the said Matthew Hodge of and to the same: That, at the time of the death of the said Matthew Hodge, the said rectory house, and the outhouses and fences and the garden land aforesaid were, and thenceforth up to and at and after the time of the said retainer and employment of

the defendants thereafter mentioned, out of repair, greatly dilapidated, ruinous, broken, and in great decay for want of the due repair thereof, and were so left by the said Matthew Hodge: That, by the law and custom of England hitherto used and approved of, all and singular the rectors and vicars of this kingdom for the time being are bound and ought to repair and sustain all and singular the houses, buildings, and tenements of and belonging to their respective rectories and vicarages, and to leave the same, so repaired, supported, and sustained, to their successors; and that, if such rectors and vicars do not leave such houses, buildings, and tenements to their successors, so repaired, supported, and sustained, but leave them out of repair and dilapidated, then the executors and administrators of the goods and chattels of such rectors and vicars respectively, after their death,—having sufficient of the goods and chattels of such rectors and vicars,—are respectively bound and ought to satisfy so much as shall be necessary to be expended or paid for the necessary repairing of such houses and tenements as aforesaid: That it was afterwards, and before the retainer and employment of the defendants thereafter mentioned, agreed by and between the plaintiff and the executrix of the said Matthew Hodge, that the said dilapidations should be valued as between them by valuers to be appointed on each side for that purpose, and, in case the said valuers should disagree, then by an umpire to be appointed by the said valuers, and that such valuation should be final and conclusive both on the plaintiff and on the said executrix of the said Matthew Hodge,—of all which premises the defendants at the time of their said retainer and employment thereafter mentioned had notice: That, before and at the respective times when the said agreement was so made as aforesaid, and the defendants were retained and employed by the plaintiff as thereafter mentioned,

1854.

JENKINS
v.
BETHAM.

1854.

JENKINS

v.

BETHAM.

Retainer.

Breach.

they the defendants exercised and carried on the business of valuers and surveyors in partnership; and thereupon, afterwards, the plaintiff, at the request of the defendants, retained and employed the defendants as such valuers and surveyors on his part, for reward to the defendants in that behalf, to value the said dilapidations on behalf of the plaintiff, and to use their best endeavours to procure the same to be fixed and settled at a reasonable amount in that behalf, as between the plaintiff as such successor as aforesaid, and the said executrix of the said Matthew Hodge; and the defendants then accepted the said retainer and employment, and afterwards entered upon the same, together with a valuer appointed by the said executrix on her behalf: Yet the defendants conducted themselves so carelessly, negligently, and unskilfully in and about the said valuation and employment, that, by and through the carelessness, negligence, and unskilfulness of the defendants in that behalf, the amount of the said dilapidations was fixed and settled by the defendants and the said valuer of the executrix of the said Matthew Hodge, at a much less sum of money than the same could and ought to have been fixed and settled at if they, the defendants, had used due care and skill in that behalf; whereby and by reason of the premises, the plaintiff was forced and obliged to, and did, accept and receive of and from the said executrix of the said Matthew Hodge a much smaller sum of money than could and ought to have been reasonably gotten from her for and in respect of the said dilapidations; and the plaintiff was also, by reason of the premises, forced and obliged to lay out and expend, and did necessarily expend, a large sum of money over and above the amount so received by him from the said executrix of the said Matthew Hodge, in and about, and in order to put the said messuage and premises into a fit and proper state of repair, and such

as the said executrix ought to have put the same in. And the plaintiff claimed 500*l*.

1854.

The defendants pleaded,—first, not guilty.

JENKINS
v.
BETHAM.

Secondly, that the plaintiff did not retain or employ the defendants as such valuers and surveyors on his, the plaintiff's, part, for reward to the defendants in that behalf, to value the said dilapidations on behalf of the plaintiff, and to use their best endeavours to procure the same to be fixed and settled at a reasonable amount in that behalf as between the plaintiff as such successor as in the declaration mentioned, and the said executrix of the said Matthew Hodge, nor did the defendants accept the said alleged retainer and employment, or enter upon the same together with a valuer appointed by the said executrix on her behalf, as in the declaration alleged. Issue thereon.

The cause was tried before Parke, B., at the last Assizes for the city of Lincoln. The facts which appeared in evidence were as follows:—The plaintiff is the rector of Fillingham, near Lincoln. The defendants are surveyors and valuers at Lincoln, and as such are employed by the Dean and Chapter of Lincoln. The plaintiff having been, in the month of April, 1852, presented to the rectory of Fillingham, vacant by the death of the late incumbent, the Rev. Matthew Hodge, and being desirous of having the dilapidations of the rectory-house and premises valued, addressed the following letter to the defendant Edward Betham:—

“ Ramsgate, April 23rd, 1852.

“ Sir,—I am anxious to have a valuation made of the dilapidations in the rectory-house at Fillingham; and I have been advised by the bishop's son, Mr. Kaye, and by Mr. Carr of Brattleby, to apply to you on the subject. Mrs. Hodge, the widow of the late rector, wishes to employ the services of Mr. White, of East Retford. Will you be good enough to inform me what is the expense of

April 23, 1852.
Plaintiff to de-
fendant.

1854.

 JENKINS
 v.
 BETHAM.

such an undertaking, and when it would be convenient to you to carry it out? There is also a large farm attached to the living. Does it appertain to your profession to value this also? If so, be good enough to tell me what are the fees.

“Yours faithfully,

“W. J. Jenkins.”

To this letter, the defendants replied as follows.—

“Lincoln, 24th April, 1852.

Reply thereto.

“Rev. Sir,—We are obliged by the kind recommendation of Mr. Kaye and Mr. Carr to you to employ us in the matter of the dilapidations upon the rectory of Fillingham, which we shall be glad to undertake, as also the valuation of the farm, which is equally within our province as surveyors. The dilapidations, as no doubt you are aware, extend to all the buildings, including the chancel of the church, as also to the fences. It is usual to make a charge by a per-centage upon the amount, where the latter is sufficient to cover for the time occupied, after the rate of three guineas per day and travelling expenses; or at the latter rate: and the same as to the valuation of the farm. When we receive your instructions, we will lose no time in arranging with Messrs. White & Son, of East Retford, to meet them at Fillingham, as no doubt you will wish to have the necessary repairs effected in the course of the approaching summer.

“Your obedient servant,

“Edward Betham.”

On the 26th of April, the plaintiff wrote to the defendants, requesting them to make arrangements with Mr. White to proceed with the valuation; in answer to which, one of the defendants, on the 12th of May, addressed the plaintiff as follows:—

“Rev. Sir,—I am going to Fillingham Rectory tomorrow morning, to take a preliminary view before I meet Messrs. White & Son there, by appointment, on

the 21st instant; soon after which day, I hope to be able to furnish you with the result of our joint estimate.

"Your obedient servant,
"Edward Betham."

1854.

JENKINS
v.
BETHAM.

The plaintiff having, on the 14th of May, again written to the defendants, remonstrating with them for the unreasonable delay in proceeding with the valuation, and requesting to be informed "about what amount the estimate would probably be," the defendant Edward Betham on the 15th wrote to him as follows:—

"Rev. Sir,—As it was only a general view that I was able to take on Thursday, I cannot possibly name any sum as the probable amount of the dilapidations; for, I could not obtain any access to the roof of the house; and much will depend upon the state I find it in, having given directions for an opening to be made. I went down to the farm, and saw Mr. Glover (the tenant), who informed me that he should have to attend at the visitation of the archdeacon on the 21st, but would return before we left. If he does not, I obtained sufficient information from him, so far as regards the premises in his occupation. Messrs. White, in their letter to me, speak of a valuation of the *fixtures*, as well as the dilapidations. Have you decided upon taking them? Will you inform me of your intention in these matters before the 21st.

"Yours faithfully,
"Edward Betham."

Again, on the 19th of May, the defendants wrote to the plaintiff, as follows:—

"Lincoln, 19th May, 1852.

"Rev. Sir,—No time shall be lost, when the dilapidations at the rectory at Fillingham are settled, in communicating the result to you: but you appear not to be aware that there are two parties in the matter; and, if the valuer on the part of the representatives of the late

1854.

JENKINS
v.
BETHAM.

incumbent and I do not accord in opinion, we must, in the usual course, resort to an umpire previously agreed upon: and, if such should be the case, further delay may occur. I write this, that you may not feel disappointed if you do not receive the report so soon as you expect. I am glad to have received your instructions respecting the fixtures, and will act upon them.

“Your obedient servant,

“Edward Betham.”

The amount of the dilapidations of the rectory-house and premises was ultimately fixed by the valuation of the defendants and Mr. White at 18*l.* 10*s.*, and that of the fixtures at 28*l.* 10*s.*, and the plaintiff paid the difference. The dilapidations of the farm-buildings were not included in this valuation; the tenant of the farm having undertaken to pay for them.

Finding, upon subsequent inquiry, that the defendants had estimated the dilapidations upon an erroneous principle, and had allowed for dilapidations to the extent only of rendering the premises *habitable*, and not with the view of their being put into *good and substantial repair*, after some correspondence with them upon the subject, the plaintiff brought this action.

Mr. Hunt, a surveyor experienced in the valuation of church property, who was called as a witness on the part of the plaintiff, stated, that he was accustomed to value according to the case of *Wise v. Metcalfe*, 10 B. & C. 299, 5 M. & R. 235,—a case very familiar to dilapidation valuers; that the broad principle is, to uphold and maintain the structure, taking no account of decorative papering or painting, except such as is to preserve wood work from decay, rebuilding where rebuilding is necessary, and then in the old form and character; that he had surveyed the rectory-house and premises at Fillingham (not including the farm), and found the dilapidations to amount to 109*l.*; that all the roofs were bad,

many rafters rotten, and the tiling decayed and imperfect; that he had a ladder raised, and examined the tiling and the ends of the rafters, and broke off the rotten parts, and also the laths; and that these defects were patent to a surveyor of ordinary skill and care. And, after going through the several items, he concluded by saying that "all were necessary for the substantial repair, according to the principle of *Wise v. Metcalfe*." Upon his cross-examination, he stated that the premises were from one hundred to one hundred and fifty years old.

Mr. Hunt's valuation was corroborated by an experienced builder; and evidence was also given, that the defendant George Betham, upon being asked upon what principle he had calculated the dilapidations, said that he and his father had been in the habit of valuing, as between outgoing and incoming incumbent, on the principle of making the house *habitable*, and putting it into *tenantable* repair; and that they never adopted the principle of putting it into *substantial* repair.

The defendants,—one of whom had been in business as a surveyor and valuer for fifty years,—on the other hand, deposed that they had valued the dilapidations according to the best of their judgment and experience, applying all the usual tests to ascertain the true condition of the premises. And other witnesses (amongst whom was Mr. White, who had valued on the part of the executrix of the late rector,) deposed to the fairness of the valuation, regard being had to the age of the premises.

The learned judge told the jury that the action was of the first impression, and that he should, if necessary, reserve the question whether an action would lie by the plaintiff against a valuer, or quasi arbitrator, in this case, on the sort of implied undertaking alleged in the declaration; and that, assuming that it would, there were three

1854.

 JENKINS
v.
BETHAM.

Summing up.

1854.

 JENKINS
 v.
 BETHAM.

questions for their consideration,—first, did the plaintiff retain the defendants as alleged? Secondly, what was the obligation created by that retainer? Thirdly, had the defendants been guilty of a breach of that obligation?

He further told them that he inclined to think that the only obligation upon the defendants, as stated in the declaration, was, to value the dilapidations,—to use their best endeavours to procure the same to be fixed and settled at a fair and proper amount, and not to supply any skill in or knowledge of the law. But, with a view to avoid further litigation, in case the court should think that the declaration meant that the defendants impliedly undertook to supply skill in and knowledge of the law as to the proper mode of valuation, his lordship told the jury that he should leave the question to them whether they *did* supply that skill and knowledge. He observed, that they did *not* supply accurate knowledge of the law; for, the case of *Wise v. Metcalfe*, 10 B. & C. 299, 5 M. & R. 235, laid down the proper rule (which his lordship explained); and that, according to the admission of the defendant Betham the younger, the defendants did not follow that rule, and probably did not know it.

“The rule of law,” said his Lordship, “to which I am alluding, might not be known to the defendants. It was a long time before it was dispersed over the country: and I shall ask you, if the defendants did undertake to supply skill, *whether they undertook to supply more than was ordinarily current in the country at large, and whether they are to bring to bear the knowledge of a lawyer or of a person who lives nearer the sources of knowledge.* That is the question I shall submit to you. If you think they are bound to supply a knowledge of the law, that is what they have not supplied. If you think they are only bound to supply that amount of knowledge

ordinarily current in the country where they live, then it will be for you to say whether they have performed their undertaking. My present impression is, that it does not involve a question of skill at all; and that is the present opinion also of my Brother Maule, who is sitting in the other court. If it is required that they should follow the strict rule of law, then, according to the case of *Wise v. Metcalfe*, they have not done their duty; they did not furnish the requisite degree of skill; they did not apply the rule laid down in *Wise v. Metcalfe*, but acted upon a different rule, and required a much less degree of repairs to be made than really should have been imposed upon the executrix. But, whether they are liable for that, will depend upon whether they did or did not undertake for a less degree of skill, and whether they have used the degree of skill which they did undertake for; and the question will be, whether there was an obligation on their part only to do their best in their situation,—which I think is all that this declaration means.”

His Lordship then left it to the jury to say whether the defendants supplied that ordinary degree of skill and knowledge which could reasonably be expected from country surveyors and valuers. The jury found that they did.

His Lordship also left it to the jury to say whether the defendants had used their best endeavours to procure the dilapidations to be fixed at a reasonable and proper rate, by diligently and carefully making the proper examination into defects; and, if they did not, what defects had they improperly omitted to value, and what was the damage by reason of that omission,—telling them that the burden of proof was on the plaintiff. The jury found on that question also for the defendants.

The following conversation then took place:—

“*Parke, B.* (to the jury),—Then, you find that the

1854.

JENKINS
v.
BETHAM.

1854.

JENKINS

v.

BETHAM.

defendants used as much skill and knowledge of the law as could be reasonably expected from persons in their situation?

The Foreman. An ordinary degree of skill.

Parke, B. They undertaking to use an ordinary degree of skill, and all their exertions,—you think they did so?

The Foreman. Yes: we think they did so.

Parke, B. I think, notwithstanding the verdict, the Messrs. Betham, and all dilapidation surveyors between outgoing and incoming incumbents, will do well to value upon the principle as it is laid down in *Wise v. Metcalfe*.

Macauley (the plaintiff's counsel). If, according to your Lordship's direction, and the allegations contained in the declaration, the defendants were bound to bring skill, including a knowledge of the law as laid down in *Wise v. Metcalfe*, then the plaintiff will have the verdict.

Parke, B. No. The jury find that the defendants did all they contracted to do, and performed their obligations.

The Foreman. We clearly think they did not act upon the law. We are clear in thinking that, and that they did not know the law.

Parke, B. But that they brought as much knowledge of the law as the plaintiff contracted for?

The Foreman. Yes: an ordinary degree of knowledge.

Parke, B. However, this will be a caution to surveyors and valuers for the future to value on the principle laid down in the well-known case of *Wise v. Metcalfe*.

Macauley. Your Lordship, I trust, will stay the execution?

Parke, B. No: certainly not. I do not think the

action is maintainable at all, as at present advised. If there had been a verdict found against the defendants, I should have stayed the execution, in order that the parties might have had an opportunity to take the opinion of the court.

1854.

JENKINS

v.

BETHAM.

"*Macauley*. Of course I shall not renew the application : but I shall observe that the case is one of some nicety ; and we should like to have the opinion of the court upon it, on your Lordship's summing up.

"*Parke, B.* I shall certainly not reserve any question for the court ; for, I have so clear an opinion upon it : and, as for the facts, it was matter for the jury."

The learned judge reported that he was satisfied with the verdict.

Macauley, in the following term, obtained a rule nisi for a new trial, on the ground of misdirection and that the verdict was against evidence. He submitted, that persons holding themselves out to be surveyors and valuers are bound to bring to the performance of the duty they undertake a competent degree of skill and knowledge ; that that degree of skill and knowledge is not to be judged by a different rule according as the parties may happen to reside in London or elsewhere ; and that the learned judge ought to have told the jury that the principle of valuation as laid down in *Wise v. Metcalfe* was a matter which every surveyor, whether in town or country, was bound to be cognisant of.

Mellor and G. Hayes shewed cause. 1. The defendants in this case stood in the position of arbitrators ; and no action will lie against an arbitrator for any miscarriage or want of skill, unless he be guilty of fraud or corruption ; and, even in that case, the remedy would seem to be only by indictment or information : *Sir G. Moore v. Foster*, Yelv. 62. The declaration here states that it

1854.

 JENKINS
 v.
 BETHAM.

was agreed between the plaintiff and the executrix of the late incumbent, that the dilapidations of the rectory-house and premises should be valued as between them by valuers to be appointed on each side for that purpose, and, in case the said valuers should disagree, then by an umpire to be appointed by the said valuers, and that such valuation should be final and conclusive both on the plaintiff and on the executrix. That clearly is an arbitration, and nothing else. The inquiry to be set on foot by the valuers involves not only the state of the premises, but also the final determination of the legal principle upon which the valuation between the parties is to proceed. [*Maule, J.* Suppose it appeared that the valuers had taken into their consideration the doctrine laid down by the court of Queen's Bench in *Wise v. Metcalfe*, and came to the conclusion that that case was not law,—which, no doubt, if the parties chose to submit that question to them, it would have been perfectly competent to them to do,—whether their conclusion were right or wrong would be perfectly immaterial. *Williams, J.* Suppose the defendants had, through ignorance of their duty, omitted to include in their valuation the dilapidations of the out-buildings, would they be liable? You must go the length of that.] It may be, that, where an arbitrator omits to decide upon some part of the matter submitted to him, the award is bad: *Cockson v. Ogle*, 1 Lutw. 550. The reference here involves the determination of a principle of law: the decision of the valuers must necessarily be in the nature of an award. [*Jervis, C. J.* Suppose the plaintiff had gone to the defendants, and said to them, “Employ your skill, and let me know the true amount of the dilapidations,” and the defendants, through gross ignorance, undervalued them,—would they not have been liable?] It may be conceded that they would. [*Jervis, C. J.* Does, then, the circumstance of their meeting a valuer on the part

of the representative of the former rector relieve them from liability?] It is submitted that it does. By the arrangement, the defendants and White were constituted arbitrators. [*Williams, J.* The substance of the thing is, that there is no submission until the matter goes to the umpire.] If the two arbitrators agree, there is no need to have recourse to the umpire. [*Maule, J.* The valuers were to value jointly, if they could: but I apprehend the defendants could not compel White to adopt the rule in *Wise v. Metcalfe*. *Jervis, C. J.* If the defendants' argument be right, an action would equally lie against White. *Williams, J.* There is no statement that White owed any *duty* to the plaintiff.] Both valuers are bound to value fairly. Both the new incumbent and the representative of the late incumbent are bound by what the valuers jointly agree to. If so, each valuer, or arbitrator, derived his authority from both. It is impossible in principle to distinguish this from an ordinary case of submission to arbitration.

2. Then, assuming that the defendants were not acting as arbitrators, what degree of skill and knowledge were they bound to bring to bear upon the subject? The case of *Wise v. Metcalfe* is not very intelligible in itself; nor is it easy for a valuer, however skilful he may be, to apply the principles which are supposed to be there laid down. The decision of that case turned mainly upon the ecclesiastical authorities. If this case had occurred before *Wise v. Metcalfe* was decided, could it have been said that the defendants were bound to be acquainted with all *that* law? Three different principles of valuation had there been proposed to the court. The first was, "that the predecessor ought to have left the premises in good and substantial repair, *the painting, papering, and white-washing being in proper and decent condition* for the immediate occupation and use of his successor, and that such repairs were to be ascertained with refer-

1854.

 JENKINS
 v.
 BETHAM.

1854.

 JENKINS
 v.
 BETHAM.

ence to the state and character of the buildings, which were to be restored where necessary, according to their original form, without addition or modern improvement." The second rule proposed, was, "that they were to be left as an out-going lay tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair, order, and condition," *the painting, papering, and white-washing not being included.* The third rule was, "that they were to be left wind and water tight only, or, as the case expressed it, in such condition as an out-going lay tenant, not obliged by covenant to do any repairs, ought to leave them." And Bayley, J., in delivering the judgment of the court, said: "We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we consider as the proper rule. The law and custom of England, or, in other words, the common law, as stated in some of the earliest precedents, p. 12 & 13 H. 8. Rot. 126. C. B., and others which we have searched, and in 1 Lutw. 116, *Salkard v. Beckwith*, is as follows:—'Omnes et singuli prebendarii, rectores, vicarii, &c., pro tempore existente, omnes et singulas domos, et edificia, prebendariorum, rectoriarum, vicariarum, &c., reparare et sustentare, ac ea successoribus suis reparata et sustentata dimittere et reliquere teneantur, et si hujusmodi præbendarii, rectores, vicarii, &c., prædicti, hujusmodi domus et edificia successoribus suis ut premittitur reparata et sustentata non dimisserint et reliquerint, sed ea irreparata et dilapidata permisserint, iidem prebendarii, &c., in vitis suis, vel eorum executores sive administratores, &c., post eorum mortem, successoribus prebendariorum, &c., illarum, tantam pecuniæ summam, quantam pro *reparatione aut necessariâ re-edificatione* hujusmodi domorum et edificiorum, expendi aut solvi sufficiet satisfacere teneantur.' An averment in terms nearly similar has been usually

introduced into all declarations on this subject. From this statement of the common law, two propositions may be deduced,—first, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to *restore* and *rebuild* them if necessary. Secondly, that he is bound only to *repair*, and to *sustain*, and *rebuild* when necessary. Both these rules are very reasonable; the first, because the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the chancel: and, if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament or luxury. It follows, from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant not obliged by covenant to do repairs, is not bound to rebuild or replace. The landlord is the person who, when the subject of occupation perishes, is to provide a new one if he think fit. And, if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed; for, papering, white-washing, and such part of the painting as is not required to preserve wood from decay by exposure to the external air, are rather matters of ornament and luxury, than utility and necessity. The authorities which have been cited from the canon law, are in unison with that which we consider to be the rule of the common law.” And, after referring to some of these, the learned judge concludes,—“Upon the whole, we are of opinion the incumbent was bound to maintain the parsonage (which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice), and

1854.

 JENKINS
 v.
 BETHAM.

1854.

 JENKINS
 v.
 BETHAM.

also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong: and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same, if the terms 'order and condition' are meant, as they most likely are, not to include matters of ornament or luxury." The substance of the decision is, that the personal representatives of a deceased incumbent are liable only to the extent of what would be necessary to put the premises into tenantable repair. [*Maule, J.* It goes much further than that. The rector is seised in fee. The intention of the law is, that the rector of the present day shall get as good a thing as his predecessor had. If that be not so, where is the line to be drawn?] That would involve papering, ornamental painting, and white-washing, which ex concessis are not required. Is the succeeding incumbent entitled to a new house? [*Maule, J.* The old incumbent is not to wear out the fee-simple.] The incumbent's means of repairing must regulate the duty: that was the old rule, before the case of *Wise v. Metcalfe*. [*Maule, J.* Regard must be had to the fitness of all things. Of course the incumbent of a living worth 50*l.* a year, would not be expected to expend double that sum in keeping up a mansion.] In *Percival v. Cooke*, 2 C. & P. 460, Best, C. J., says,—“The surveyor has gone on the principle that the representatives of the late incumbent are bound to do everything to the premises which an in-coming tenant would do. That is not law. They are bound to do no more than ought to

be performed by an out-going tenant. The executors of a deceased incumbent are, in fact, bound to do nothing more than restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises." What is the difference between putting premises into tenantable repair, and putting them into such a condition as an in-coming tenant would be entitled to have them? The recent case of *Huntley v. Russell*, 13 Q. B. 572, shews that the incumbent of a rectory is not to be charged with waste to the extent to which an ordinary tenant would be chargeable. Such being the difficulty and the uncertainty of the law upon this subject, is a knowledge of the law to be imported into a contract of this sort? There are many professions to the practice of which a man is bound to bring a competent amount of skill. Such is the case of an engineer. (a) But no man,—not even an attorney (b),—is bound to possess a precise and accurate knowledge of the law.

3. Assuming, however, that the possession of skill or knowledge of the law is to be imported into this contract, it must be a reasonable amount of skill; and that is a question for the jury, and is not to be laid down by the judge as matter of law. In the case of an attorney, it may be that the judge may tell the jury what amounts to *crassa negligentia*, so as to render him liable for the consequences of his ignorance or want of care. But, in the case of a surgeon or an apothecary,—which more nearly resembles this case,—the question must necessarily be left to the discretion of the jury, seeing that the judge has no peculiar knowledge which may not be possessed by them. What is the amount of skill that is required from a country surgeon, for instance? Is he to be measured by the same standard that would be applied to

1854.

 JENKINS
 v.
 BETHAM.

(a) See *Dakin v. Brown*,
 ante, Vol. VIII, p. 92.

(b) See *Parker v. Rolls*,
 ante, Vol. XIV, p. 691.

1854.

 JENKINS
 v.
 BETHAM.

the first London practitioner? (a) If not, then there can be no objection either to the way in which this case was presented to the jury, or to the way in which they have dealt with it.

Macauley and *Field*, in support of the rule. 1. There is no pretence for saying that these defendants were employed as arbitrators. They were employed, as alleged in the declaration, for reward, to make a valuation of the dilapidations on behalf of the plaintiff. [*Maule*, J. Is that so? Would not the defendants have performed their duty to the plaintiff, if they had met White, and had agreed with him, neither of them making a separate valuation? They were to make a valuation together for both parties. That this is so, is strongly illustrated by the stipulation, that, if the defendants and White cannot agree, the valuation should be made by *an umpire*. The umpire would clearly be acting for both.] It was agreed that each party should employ a surveyor to make the valuation for each. If the two valuers agreed, the parties were to be bound by the valuation so fixed. The event upon which the umpirage would come into existence, was, the disagreement of the two valuers. [*Maule*, J. The defendants and White were employed to make "a valuation" between the plaintiff and the executrix of the late incumbent. Each of the parties had a vested right in a certain quantity of skill in each surveyor. Do they lose that right by agreeing that they shall jointly act for them?] Clearly not. The case is somewhat analogous to *Story v. Richardson*, 6 N. C. 123, 8 Scott, 291, where an accountant was held responsible for want of proper skill and diligence in making up partnership accounts.

2. The direction to the jury was clearly wrong. The

(a) See *Seare v. Prentice*, 8 East, 348; *Lanphier v. Phipos*, 8 C. & P. 475.

learned judge over and over again told them that there was no contract here for any skill at all. The principle upon which ecclesiastical dilapidations are to be valued, is not a matter of doubt or difficulty. The rule is clearly and accurately defined in *Wise v. Metcalfe*, which it was proved at the trial was well known and always acted on by ecclesiastical surveyors : and that case itself was only a declaration of the antient law and custom of England. Holding themselves out as surveyors and valuers of church property, the defendants clearly were not justified in being, as the jury found they were, wholly unacquainted with the rule of valuation adopted in that case. The question involved no inquiry as to the amount of skill the defendants possessed. Upon their own admission, they were in a state of absolute and unqualified ignorance upon the subject. Assuming, therefore, that the direction, however calculated to mislead the jury, was substantially right, the conclusion to which the jury came was clearly not warranted by the evidence.

1854

 JENKINS
v.
BETHAM.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

There are two questions in this case. The first is, whether the action will lie ; and the second, whether the jury found a right verdict upon the evidence.

If the first question were decided for the defendants, the second question would not arise. But we think that both questions ought to be decided for the plaintiff.

At the trial, my Brother Parke told the jury that the action was of the first impression, and reserved the point whether it would lie against the defendants, as valuers, or quasi arbitrators, on the sort of implied undertaking alleged in the declaration.

We do not think that the action is brought against the defendants for misconduct as quasi arbitrators be-

1854.

JENKINS
v.
BETHAM.

tween the parties. The cause of action is, that the defendants, by holding themselves out as valuers and surveyors of ecclesiastical property, represented themselves as understanding the subject, and qualified to act in the business in which they professed to act, and thus induced the plaintiff to retain and employ them; whereas they were ignorant of the subject, and the plaintiff by reason of their ignorance sustained a loss. Their ignorance of the subject, and incompetency to act in the business, were in part shewn by their failure upon the valuation which subsequently took place: but that was not the whole cause of action. The cause of action was, their undertaking that they were competent, and the breach of that undertaking, followed by a loss sustained by the plaintiff.

It is not necessary to consider whether an action will lie against an *arbitrator* for anything done by him whilst acting strictly within that capacity, because this is not that case. If the defendants, in consideration of the plaintiff's retainer, had entered into a written engagement that they were qualified to act, and understood the subject, there is no rule of law which would have protected them from liability for a loss caused by a breach of that engagement. The contract which in the case put would be expressed, may in *this* case be implied from the circumstances; and we therefore think that the action will lie.

Assuming, then, that the action will lie, the question is, is the verdict right, upon the evidence? Upon this part of the case, the learned judge who presided at the trial reports that he inclined to think that the only obligation stated in the declaration, was, to value the dilapidations, and to use their best endeavours to procure the same to be fixed and settled at a fair and proper amount; and not to supply skill and knowledge of the law; but that, to avoid further litigation,—in case this

court should think that the declaration meant that the defendants impliedly undertook to supply skill and knowledge of the law as to the proper mode of valuation,—he told the jury that he would leave the question to them, whether the defendants *did* supply that skill and knowledge; that it was clear that they did *not* supply accurate knowledge of the law, because they did not follow the rule laid down in the case of *Wise v. Metcalfe*, 10 B. & C. 299, 5 M. & R. 235, or, indeed, know of that case. He told the jury that the defendants were not bound to supply that accurate knowledge, but left it to them to say whether the defendants had supplied that ordinary degree of skill and knowledge which would reasonably be expected from country surveyors and valuers: and the jury found that they did.

We agree with my learned Brother, that the defendants could not be expected to supply minute and accurate knowledge of the law; but we think, that, under the circumstances, they might properly be required to know the general rules applicable to the valuation of ecclesiastical property, and the broad distinction which exists between the cases of an incoming and an outgoing tenant, and an incoming and an outgoing incumbent. According to the evidence, it is plain that the defendants acted in the valuation as if it were the case of outgoing and incoming tenant merely, and that they knew of no other rule. Their ignorance in this respect was a breach of their previous engagement; and the jury ought not, under such circumstances, to have found a verdict for the defendants. There must, therefore, be a new trial, upon the ground that the verdict is against the evidence: and the costs will abide the event.

Rule absolute accordingly.

Mellor, for the defendants, applied for leave to appeal, *Semble*, that

VOL. IV.—C. B.

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1854.

JENKINS
v.
BETHAM.

1854.

 JENKINS
 v.
 BETHAM.

the 34th and
 35th sections of
 the Common
 Law Procedure
 Act, 1854,—
 17 & 18 Vict.
 c. 125,—are not
 retrospective,
 though the
 44th section is.

under the 35th section of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125, which enacts, that, “in all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to shew cause be refused, or if granted be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or *provided the court in its discretion think fit that an appeal should be allowed*: provided, that, where the application for a new trial is upon a matter of discretion only, as, on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed.” [Jervis, C. J. The 35th section is not retrospective: its language shews that it could only have been intended to apply to cases where the trial has taken place since the passing of the act. In *Hughes v. Lumley*, 19 Jurist, 60, the court of error decided that the 32nd section, which provides that error may be brought upon a special case, unless the parties agree to the contrary, is not retrospective.] The 44th section, which enacts, that “when a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order,” is assumed in this very case to be retrospective in its operation. The 34th section provides that, “in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused, or granted and then discharged or made absolute, the party decided against may appeal.” If the learned judge had ruled against the defendants at the trial, instead of reserving the point, as he intimated he should in the event of the jury finding for the plaintiff, the defendants would clearly have been entitled to appeal. [Maule, J. It is hard to say that a man shall be

bound by a state of the law of which he had no notice at the time to which it is sought to make it applicable.] That may be an answer to the application so far as regards the 34th section. But it is submitted, that the fact of the court having taken time for deliberation, shews that this is a case for the exercise of its discretion under s. 35.

1854.

JENKINS
v.
BETHAM.

JERVIS, C. J. We agreed with the ruling of the judge: but we think the jury have not arrived at a right conclusion. The last words of the 35th section,—“provided, that, when the application for a new trial is upon a matter of discretion only, as, on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed,”—are against you.

The rest of the court concurring,

Rule refused. (a)

(a) The cause went down again for trial at the Spring Assizes for Lincoln in 1855, but ended in a compromise.

In a Report of a select committee of the Royal Institute of British Architects, on the subject of dilapidations, published in 1844, the following resolution as to ecclesiastical dilapidations was adopted, and, it is understood in the profession, has ever since been acted upon:—

“The committee are of opinion that the usual practice as to ecclesiastical dilapidations, is, to consider that (independ-

dently of the obligation to compensate for actual deficiencies) the representatives of a late incumbent are liable for the value of repairs equivalent to, or consonant with, the extent of those which, in civil cases, a lessee would be called upon to perform on taking a lease for twenty-one years, under an agreement to put the premises into complete and substantial repair at the commencement of such term. The committee, however, especially direct attention to the case of *Wise v. Metcalfe*.”

1854.

WILKIN v. REED.

June 3.

The declaration in an action for giving a false character of one P., a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he had dismissed P. from his employ, was, the decrease in his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty.

It appeared at the trial, that P. had been guilty of dishonesty while

in the defendant's employ, but that the defendant had not mentioned that fact to the plaintiff when he recommended him to try P. It further appeared, however, that P. had not been dismissed from the defendant's employ on account of his dishonesty, but really for the reason which the defendant had assigned to the plaintiff:—

Held, that this evidence did not support the declaration.

The judge at the trial refused to allow the declaration to be amended by inserting an allegation "that P., whilst in the defendant's employ, was guilty of dishonesty," instead of the allegation "that P. had been dismissed from the employment of the defendant on account of dishonesty:—"—Held, that the amendment was properly refused,—the matter in controversy between the parties being, not whether the defendant had fraudulently suppressed the fact that P. had been guilty of dishonesty, but whether he had given the true reason for having dismissed him.

Seem, that it is for the judge at the trial, looking at the record and at the evidence, to say what is "the real question in controversy between the parties," within the meaning of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 222.

THIS was an action for an alleged false representation as to the character of a clerk.

The declaration stated, that, during all the time thereafter mentioned, the plaintiff practised as an attorney and solicitor, and carried on business as such: That one William Henry Pargeter applied to the plaintiff to employ him as clerk of the plaintiff in the plaintiff's said business,—of which the defendant, at the time of the false and deceitful representations and assertions made by the defendant as thereafter mentioned, had notice: That the said William Henry Pargeter had, before the time of the committing of the said grievances by the defendant, been in the employment of the defendant and his partners, carrying on business as attorneys and solicitors, and had ceased to be in such employment: That thereupon the defendant, well knowing the premises, but intending to deceive and defraud the plaintiff, and to induce the plaintiff to employ the said William Henry Pargeter as clerk of the plaintiff in the plaintiff's said business, falsely, deceitfully, and fraudulently [represented and

asserted to the plaintiff that the principal reason of the said William Henry Pargeter having left the employ of the defendant and his said partners, was, the alteration that had recently been made in the practice of common law by the Common Law Procedure Act, and the reduction of the profits of that branch of their business ; that the only branch of the profession in which the defendant considered the said William Henry Pargeter deficient, was, Chancery ; but that, with that exception, considering the nature of the plaintiff's business, the defendant thought the plaintiff would find the said William Henry Pargeter very useful, and that the defendant] recommended the plaintiff to try the said William Henry Pargeter ; and the defendant then knowingly suppressed and concealed from the plaintiff the fact that the said William Henry Pargeter had been [dismissed from the employment of the defendant and his said partners on account of the dishonesty of the said William Henry Pargeter] : By means and in consequence of which said false representations and assertions of the defendant, the plaintiff, believing and relying on the truth of the said representations and assertions, and not knowing or believing to the contrary, and induced thereby, took the said William Henry Pargeter into his, the plaintiff's, employ as clerk in the plaintiff's said business, and the said William Henry Pargeter entered upon the said employ, and continued for some time therein : Whereas, in fact, as the defendant at the time of making the said representations and assertions well knew, [the principal reason of the said William Henry Pargeter having left the said employ of the defendant and his said partners, was not the reason so assigned, represented, and asserted by the defendant ; and whereas, as the defendant at the time of making the said representations and assertions well knew, the principal reason of the said William Henry Pargeter's having left the said employ

1854.

WILKIN
v.
REED.

1854.

WILKIN

v.

REED.

of the defendant and his said partners, was, that] the said William Henry Pargeter had been dishonest, and had committed divers acts of dishonesty: That, after the making of the said false, deceitful, and fraudulent representations and assertions, and before the commencement of this suit, the plaintiff sustained great loss and damage by reason of and in consequence of the same, in this, that, after the plaintiff had taken the said William Henry Pargeter into his said employ, and whilst the plaintiff, induced by and relying on the said representations and assertions of the defendant, was employing the said William Henry Pargeter as aforesaid, the said William Henry Pargeter, in his said employ, and in violation of his duty therein, and before the commencement of this suit, improperly and fraudulently obtained and received moneys of the plaintiff, and improperly and fraudulently appropriated and applied to his the said William Henry Pargeter's own use certain moneys of the plaintiff, and certain moneys which he ought to have paid but did not pay to the plaintiff, and improperly and fraudulently omitted to apply to certain purposes for and on behalf of the plaintiff certain moneys which he ought as such clerk to have applied to such last-mentioned purposes, and improperly and fraudulently appropriated and applied to his the said William Henry Pargeter's own use certain moneys of clients of the plaintiff in his said business, and for which the plaintiff was responsible; and by reason of the premises, the plaintiff, before the commencement of this suit, wholly lost the said moneys, and was damaged to the amount of the same.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Maule, J., at the second sitting in London in Easter Term last. The facts which appeared in evidence were as follows:—The plaintiff, an attorney, in November, 1852, wanting a managing

clerk, and being referred by one William Henry Pargeter, who was desirous of entering into his employ in that capacity, to the defendant, who was a member of a firm in whose service Pargeter had been, for his character and acquirements, called upon the defendant, and asked him,—first, for what reason Pargeter had left his employ,—secondly, whether he was sober,—thirdly, whether he was competent to be intrusted with the conduct of the plaintiff's business in his absence. To the first of these questions, the defendant replied, that Pargeter had left his employ in consequence of the decrease in the profits of his business, resulting from the changes introduced by the Common Law Procedure Act; to the second, that Pargeter was sober; and, to the third, that he perfectly understood common law, but required a good deal of looking after in Chancery: and he added,—“He will suit you very well; and I should recommend you to try him.” Upon this representation and recommendation the plaintiff took Pargeter into his employ, but was ultimately obliged to dismiss him, having discovered that he had embezzled considerable sums of money which had been intrusted to him.

It was proved that Pargeter had whilst in the defendant's employ committed similar acts of dishonesty. But it appeared that the defendant had, out of consideration for his wife and family, and his professions of contrition, overlooked his offences, and continued him for some time in his employ; and that he was ultimately discharged for the reason which the defendant had assigned.

The plaintiff's counsel thereupon applied that the declaration might be amended, by striking out the parts within brackets, and inserting therein, in place of the words “*dismissed from the employment of the defendant and his said partners on account of the dishonesty of the*”

1854.

 WILKIN
v.
REED.

1854.

 WILKIN
 v.
 REED.

said William Henry Pargeter," the following words, "while in the employment of the defendant and his said partners, *guilty of dishonesty.*"

The learned judge, after some consideration, declined to allow the proposed amendment; and, being of opinion, that, upon the record as it stood, there was no evidence to support the declaration, he directed the jury to find a verdict for the defendant.

Byles, Serjt., in Easter Term last, obtained a rule nisi for a new trial, on the ground that the learned judge had improperly refused to allow the declaration to be amended, and that there was evidence to go to the jury in support of the declaration as it stood; citing *Foster v. Charles*, 4 M. & P. 61, 741, 6 Bingh. 396, 7 Bingh. 105. He also moved substantively for an amendment under the 15 & 16 Vict. c. 76, s. 222.

Watson and *Lush* now shewed cause. There was no evidence to support the declaration as it stands. The gravamen is, that the defendant falsely represented to the plaintiff that the principal reason of Pargeter having left the employ of the defendant and his partners, was, the alteration in the practice, and the consequent reduction of profits, and suppressed the fact that Pargeter had been dismissed on account of dishonesty. It appeared that Pargeter had in fact been guilty of dishonesty whilst in the employ of the defendant and his partners. But there was no evidence that that was the ground of his dismissal. On the contrary, it distinctly appeared that his offence had been condoned, and that he continued in the employ for a considerable period afterwards, and was in truth discharged for the reason which the defendant assigned.

Then, as to the amendment,—The 3 & 4 W. 4, c. 42, s. 23, is still in operation, and is unrepealed by the 15

& 16 Vict. c. 76, s. 222: and, under that statute, though there was a right of appeal where an amendment was improperly made, there was none where the application to amend was refused: *Doe d. Poole, v. Errington*, 1 Ad. & E. 750, 3 N. & M. 646, 1 M. & Rob. 343. (a) [*Jervis C. J.* The point was recently before this court in a case of *Lewis v. Clifton*. (b) My Brother Byles there contended stoutly, that, I having refused to allow an amendment at the trial (in which I think I was wrong), there was no power of appeal. We shall, no doubt, presently hear him arguing as stoutly the other way.] The 222nd section of the 15 & 16 Vict. c. 76, gives very large powers to the court to amend at any stage of the proceedings. It enacts that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." The amendment here sought was not justified by the facts, and would not, if allowed, conduce to the determination of the real question in controversy between the parties. [*Jervis, C. J.* Assuming that Pargeter had

1854.

 WILKIN
v.
REED.

(a) But see *Parks v. Edge*, 2 C. M. & R. 190, 5 Tyrwh. 685. 1 C. & M. 429, 3 Tyrwh. 364 (nom. *Parker v. Ade*, 1 Dowl. P. C. 643); *Pullen v. Seaven*, 2 Gale, 132; *Whitwill v. Scheer*, 8 Ad. & E. 301, 3 N. & P. 398. And see *Parry v. Fairhurst*,

(b) In *Lewis v. Clifton*, the court took time to consider; but no judgment was pronounced, the parties having settled.

1854.

WILKIN
v.
REED.

been guilty of the dishonesty alleged, the omission to mention it to the plaintiff was no cause of action.] Clearly not. [*Cresswell*, J. Many cases might be supposed where it would not only be unnecessary, but cruel and unjustifiable, to disclose a sin of which the clerk had repented, and for which he had obtained forgiveness.] There is no matter in controversy between these parties except that which the declaration discloses, viz. whether or not the defendant was guilty of a fraudulent misrepresentation. The plaintiff, having failed to substantiate that charge, now seeks to substitute another, viz. whether the defendant was guilty of a fraudulent suppression of a fact which he was bound to disclose. Who is to determine whether or not the case is one for amendment? [*Jervis*, C. J. The court of Queen's Bench have held that it is for the judge to determine it. *Maule*, J. I should be inclined to hold that it is a matter of fact, to be decided by the judge on reference to the record and to the evidence, whether or not the amendment proposed is necessary for the purpose of determining the real question in controversy between the parties. The statute could not have contemplated the amendment to extend to every matter which could by possibility be started in the course of the trial. It has been thought by some of the judges that the presiding judge is bound to make an amendment, if asked for, if by so doing *some* question might be raised between the parties. But that clearly is not correct. Whether the decision at nisi prius is final or not, is a very nice question. *Jervis*, C. J. If the course of legislation upon the subject of amendments at nisi prius be looked at, it will be found to afford an argument against the decision of the judge being reviewable. Formerly, amendments could only be made at Chambers. Then came the 9 G. 4, c. 15, which empowered the judge at the trial to amend in the case of a variance

"between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record :—" and the discretion thus vested in the judge has been held not to be reviewable by the court,—*Parks v. Edge*, 1 C. & M. 429, 3 Tyrwh. 364. Then came the 3 & 4 W. 4, c. 42, s. 23, which considerably extended the power of the judge, and enabled him to amend "when any variance should appear between the proof and the recital or setting forth on the record, &c., of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party could not have been prejudiced in the conduct of his action, prosecution, or defence;" and it concludes with a proviso, "that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, &c., respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and, in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them shall seem meet." Under that statute, the refusal of the judge to allow an amendment was held not to be subject to review by the court,—*Doe d. Poole v. Errington*, 1 Ad. & E. 750, 3 N. & M. 646, 1 M. & Rob. 343. Then comes the 15 & 16 Vict. c. 76, s. 222, which gives very large powers of amendment, at all times, to "the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius," and concludes with saying that "all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." Nothing is there said about the power to review: and, if the legislature had

1854.

 WILKIN
 v.
 REED.

1854.

WILKIN

v.
REED.

intended the discretion to be subject to appeal, I think they would have said so. *Crowder, J.* I think it would require strong and express words to justify the conclusion that the exercise of discretion by the judge is not reviewable. *Maule, J.* The recent statute imposes a duty upon the persons who are authorised to amend, to make the amendment in all cases where the amendment is such as may be necessary for determining in the existing suit the real question in controversy between the parties. The court may do it, a judge at Chambers may do it, and the judge at nisi prius may do it. Nothing is said about review: that is left to the general law. Probably the decision of a judge at Chambers might be reviewed in full court. It may be affirmed generally, that, where a thing may be done by the court, or a judge, and the judge does it, his decision may be reviewed. (a) But here, I think, whether the amendment is made (or refused) by the court, or by a judge at Chambers, or the judge at the trial, the decision cannot be reviewed. *Jervis, C. J.* Certainly there is no necessity for the power to review, seeing that the refusal of the judge to amend does not preclude the party from making a substantive application to the court for an amendment.] If there be a substantive application to the court for an amendment, it must be made upon an affidavit that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties; and the other side will have an opportunity of answering it. Assuming that the court has power to review the decision of the learned judge in refusing the amendment, it is submitted that that discretion was properly exercised. The amendment asked for, was, the introduction of an averment that

(a) See *Rex v. Almon*, Wilmot's Notes, 264; *Darrington v. Price*, ante, Vol. VI, p. 309.

the defendant had knowingly suppressed and concealed from the plaintiff the fact that Pargeter had been, while in the employment of the defendant and partners, guilty of dishonesty. There was no evidence to support that allegation, if allowed to be introduced. There was in fact no fraudulent concealment; for, the dishonesty of Pargeter was not in the defendant's mind at the time as a cause of dismissal. [*Maule, J.* I inclined to think that the amendment ought to be made, if the defendant, dishonestly intending to get Pargeter into the plaintiff's service, was silent upon the subject of a delinquency on the part of Pargeter which he was bound to communicate to the plaintiff. In that case, I should say the concealment was a cause of action. But that state of things did not exist here: and, in order to bring the case within the statute, not only must it have existed, but it must have been the matter in controversy between the parties in the suit.]

1854.

WILKIN

v.

REED.

Couch (with whom was *Byles, Serjt.*), in support of the rule. That which took place between the parties when the representation complained of was made, was this,—The plaintiff, who from having recently met with a severe accident was not able to give much personal attention to business, was desirous of hiring a clerk on whom he might place reliance. The mere fact of his going to the defendant under such circumstances should have induced the latter, even if no inquiry was specifically made as to Pargeter's character for honesty, to say something upon the subject. The fact of the plaintiff's inquiries being limited to the cause of Pargeter's dismissal, his sobriety, and his capacity for business, did not justify the defendant in abstaining from communicating to him that Pargeter had, whilst in his employ, been guilty of dishonesty. There was evidence, therefore, to go to the jury upon the declaration as originally

1854.

WILKIN
v.
REED.

framed. It alleges that the defendant, intending to deceive and defraud the plaintiff, and to induce him to employ Pargeter as his clerk, falsely, deceitfully, and fraudulently (omitting the allegations as to the supposed cause of dismissal, and as to professional ability of the clerk,) recommended the plaintiff to try Pargeter. The argument on the other side seeks to narrow that into a recommendation of the party on the score of his attainments, irrespective of his moral qualities. [*Jervis, C. J.* The gravamen is, that the defendant suppressed and concealed the fact that Pargeter had been dismissed from his employ on account of dishonesty. And it was proved that the only ground of his dismissal was, the diminution of profits on account of the altered practice of the courts.] Assuming that an amendment was necessary, that which was asked was clearly an amendment within the intention of the statute, and one which the learned judge was bound to make. The evidence was that the defendant concealed (fraudulently, we say,) the fact that Pargeter had been guilty of dishonesty. The substantial question which the parties went down to try, was, whether or not the defendant fraudulently induced the plaintiff to take Pargeter into his employ, by means of the representations and concealment made by him, when asked to certify as to the character and qualifications of Pargeter. [*Maule, J.* It was not such a general amendment as that which you asked for.] The application to amend was limited to the apparent necessity. [*Maule, J.* Was the amendment proposed such an amendment as would enable you to try the real question in controversy between you? Now, whether or not the defendant fraudulently suppressed the fact that Pargeter had at some period of time whilst in the defendant's service been guilty of dishonesty, never was a question in controversy between the plaintiff and the defendant.] It was at all events an essential part of the inquiry.

Then, the determination of the judge, whether the amendment is allowed or refused, is clearly subject to the control and revision of the court in banc. [He was stopped by the court.]

1854.

 WILKIN
v.
REED.

JERVIS, C. J. As we are all of opinion that the rule must be discharged on the other grounds, it is unnecessary to enter into any discussion as to whether or not the decision of the judge at nisi prius upon the 15 & 16 Vict. c. 76, s. 222, is reviewable by the court. That question presents some difficulty; and, if it had been necessary to determine it, I for one should have been glad to hear what could be said in support of the affirmative, and probably should have desired time to consider. I do not think that this rule can be sustained upon either of the grounds upon which it was moved. In the first place, it has been insisted that there was evidence enough to support the declaration as it originally stood. If you strike out of the declaration that which was disproved, viz. the allegation that the defendant falsely and fraudulently represented that the decrease of business was the ground of Pargeter's discharge, and that he knowingly suppressed and concealed from the plaintiff the fact that Pargeter had been dismissed on account of dishonesty,—enough does not remain to give a cause of action. The representation the falsehood of which is relied on, turned out to be true. The recommendation to try Pargeter, is not the gravamen of the charge. Then, it is further contended that my Brother Maule unduly exercised the discretion vested in him by the statute, in refusing to allow an amendment to be made. I think there is no pretence for saying that. Assuming that we have power under the 222nd section to review the decision of the judge at nisi prius,—which I by no means concede,—I think the amendment was properly refused. The amendment is to be “such as may be ne-

1854.

WILKIN
v.
REED.

cessary for the purpose of determining in the existing suit the real question in controversy between the parties,"—that is, the question in agitation between them, which they went down to try. Now, here, the parties clearly did not go down to try whether or not Pargeter had at some time while in the defendant's service been guilty of some act of dishonesty, or whether the defendant had recommended the plaintiff to try him; but, whether or not the defendant had falsely and fraudulently represented to the plaintiff that Pargeter had been dismissed from his service upon a ground which did not affect his moral character, whereas in truth he had been dismissed upon another ground, which did. That alone was the question in controversy between them. There was no dispute whatever about the rest. I therefore think the conclusion my Brother Maule came to was perfectly right.

MAULE, J. I thought at the trial, and I think still, that the amendment asked for was one which ought not to be allowed. It appeared to me to be plain from the pleadings and the evidence, as well as from the opening of the plaintiff's counsel, that the question in controversy between the parties was, whether or not the defendant had truly represented to the plaintiff that Pargeter had been dismissed from his service on account of the decrease of business. That was the question, and the only question in controversy: according as that representation was true or false, the plaintiff would fail or succeed. This clearly could not be a case for amendment under any statute but the last. The 3 & 4 W. 4, c. 42, s. 23, which was passed for the purpose of extending the powers of amendment given by the 9 G. 4, c. 15, allowed amendments only in matters "not material to the merits of the case." The 15 & 16 Vict. c. 76, s. 222, goes much further: it enacts that "it shall be lawful for the superior courts of common law, and

1854.

 WILKIN
 v.
 REED.

every judge thereof, and any judge sitting at nisi prius, at all times to amend *all* defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made, with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made." That section enables the court or judge to make the amendment in the cases provided for, whether it be in a matter that is material to the merits of the case, or not. Now, whether or not a particular amendment is in a matter material to the merits, is matter of law: but, whether or not the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties, is matter of fact, to be decided by the judge. It often happens, that, there being a controversy, the parties are unable to try that controversy properly, because the pleadings between them do not correctly shew upon the record what that controversy is. It was to obviate that inconvenience that this section was framed. What was the question in controversy between these parties which was insufficiently stated upon this record? That there was a controversy between them as to the defendant's representation of the true cause of Pargeter's dismissal from the defendant's employ, is true. But it is not true that there was a controversy between them as to whether or not Pargeter had been guilty of dishonesty, or whether or not that fact had been fraudulently concealed or suppressed by the defendant. The record did not raise those questions; nor was there any evidence of them upon which I as a judge could act. It has been contended that there still remained something on the face

1854.

WILKIN
v.
REED.

of the declaration which might give the plaintiff a cause of action : but I think, that, striking out what the plaintiff failed to prove, that which is left is altogether immaterial. I think it was intended by the Common Law Procedure Act to limit the power of amendment to the introduction of matters which the parties hoped and intended to try in the cause, and not to authorise amendments which might raise questions which never were contemplated before. There was nothing here to shew that the matter sought to be introduced by the proposed amendment ever was a question in controversy between the parties : on the contrary, there was strong ground for presuming that no such controversy existed at all. I therefore think the decision right.

CRESSWELL, J. I am of the same opinion. Without entering into the much vexed question as to the power of the court to review the decision of a judge refusing to allow an amendment, I am clearly of opinion that the amendment asked for upon this occasion was properly refused, inasmuch as it sought to introduce a matter which was not in controversy between the parties at the time.

CROWDER, J. I am of the same opinion upon both points. There was nothing whatever to go to the jury upon the declaration as originally framed. All the material allegations were disproved. Then, as to the proposed amendment. The 222nd section of the 15 & 16 Vict. c. 76, enacts that all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be made. Now, the only question in controversy here was, whether or not the false and fraudulent representation imputed to the defendant had really been made by him. The matter which the amendment sought to introduce, was, to raise a question whether or

not the defendant had been guilty of a fraudulent concealment or suppression of Pargeter's dishonesty,—a fact which never was in controversy between them at all. It seems to me, to say the least of it, very doubtful whether that was a ground of action. But it is enough to say that it was not a matter in controversy, and therefore that the learned judge very properly refused to allow it to be placed upon the record.

Rule discharged.

FERET v. HILL.

May 29.

THIS was an action of ejectment brought to recover the possession of rooms on the second floor of a house No. 2, Jermyn Street, of which the plaintiff had been dispossessed under the circumstances hereinafter disclosed.

The cause was tried before Crowder, J., at the second sitting for Middlesex in Easter Term last. The facts were as follows:—In the month of February, 1853, the plaintiff applied to the defendant to let him certain apartments in the house in question, which belonged to the defendant, *representing that he wanted them for the purpose of carrying on therein the business of a perfumer*, and referring for his character and circumstances to a French gentleman named Pilon. In answer to inquiries made of him, M. Pilon stated that he had known Feret for about four years, that he believed him to be a respectable man, and that he carried on the perfumery business. The defendant thereupon consented to accept the plaintiff as tenant of the rooms in question; and an agreement was drawn up and signed by both parties. This agreement was dated the 1st of March, 1853, and it was thereby stipulated that the plaintiff should take

A. procured B. to grant him a lease of premises, by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, A. converted the premises into a common brothel, whereupon B. forcibly expelled him:—Held, that A. might maintain ejectment,—the fraudulent misrepresentation, and the subsequent illegal use of the premises, not being sufficient (at law) to avoid the lease.

1854.

WILKIN
v.
REED.

1854.

FERRET
v.
HILL.

and the defendant let the rooms to the plaintiff at the yearly rent of 30*l.*, payable quarterly, the tenancy to be determinable by a three months' notice in writing.

The plaintiff was accordingly let into possession : but, instead of carrying on the business of a perfumer, he converted the premises into a common brothel ; whereupon the defendant gave the plaintiff notice to quit forthwith, and, upon his refusal to do so, forcibly expelled him.

On the part of the defendant, it was submitted, that, inasmuch as the facts shewed that the plaintiff had hired the premises for the purpose of using them for an immoral and illegal purpose, the agreement was altogether void ; and, further, that the defendant had been induced by the plaintiff's false representation to enter into the contract, and therefore was justified in rescinding it.

Evidence was then offered on the part of the defendant,—with a view to shew that the plaintiff was a disreputable character,—that he had been charged twice before a magistrate, once with having committed an indecent assault upon a policeman, and once with having been found in a common gaming-house, upon which latter occasion he was fined 40*s.* This evidence was objected to on the part of the plaintiff, and the learned judge thought it inadmissible ; but, the defendant's counsel strenuously urging it, his lordship received it.

Two questions were left to the jury,—first, whether the plaintiff, at the time he hired the apartments, intended to use them, or to permit them to be used, for an immoral or illegal purpose,—secondly, whether he had induced the defendant to let them to him, by fraud and misrepresentation.

The jury found both those questions in the affirmative ; and accordingly the learned judge (though he thought the facts proved afforded no defence to the action)

directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter the verdict for him, if the court should be of opinion that the agreement was valid, notwithstanding the facts found by the jury.

1854.

 FERRET
v.
HILL.

Mussey Dawson in due course obtained a rule nisi accordingly, and also for a new trial on the ground of the improper reception of the evidence collaterally affecting the plaintiff's character.

Montagu Chambers and *Raymond*, on a former day in this term, shewed cause. As to the admissibility of the evidence as to the plaintiff's character,—the plaintiff must have known his own antecedents. [*Crowder*, J. The evidence was clearly inadmissible.] The evidence was offered for the purpose of shewing that the representations made by the plaintiff as to his character, and as to the business he meant to carry on upon the premises, were false. He is responsible for the statements made by *Pilon*, to whom he referred the defendant. [*Maule*, J. You would say that the plaintiff, knowing his own infamy, was guilty of fraud in referring to a man who did not: *Cornfoot v. Fowke*, 6 M. & W. 358.]

The main point is, whether the conduct of the plaintiff did not render the agreement absolutely void. [*Williams*, J. The estate passed by the agreement. I do not see how it got back.] In order to entitle him to maintain this action, the plaintiff must shew that the legal right to the possession of the premises in question was withdrawn from the defendant; and that he can only do by shewing a *legal* agreement transferring it to himself. The evidence shewed that the agreement was obtained by fraud and misrepresentation, and for a purpose which rendered it a perfect nullity. [*Maule*, J. The agreement, if void at all, was void at the election of

1854.

FERREY
v.
HILL.

the defendant, provided he intimated his election with proper promptness. Suppose he had accepted rent from the plaintiff after he had become aware of the sort of use the plaintiff was making of the rooms, no doubt he would be precluded from his right of declaring the contract void.] Where an agreement is contrary to law or to public policy, and both parties concur in the illegal intention, it is absolutely void, and cannot be enforced. In *Ritchie v. Smith*, antè, Vol. VI, p. 462, it was held that an agreement entered into for the purpose of enabling one of the parties to it to contravene a statute passed for the protection of public morals,—as, to enable an unlicensed person to sell exciseable liquors, contrary to the 9 G. 4, c. 61,—is illegal and incapable of being enforced in a court of law. Wilde, C. J., there says : “The licence granted by the magistrates has no reference whatever to revenue purposes ; it is required solely for the protection and preservation of the public morals, and the prevention of crimes and offences which are subversive of good order and the public safety ; and the magistrates are careful, before granting such licence, to ascertain that the convenience of the neighbourhood calls for it, and that the party seeking it is of good character, and possesses the necessary qualifications for a licensed victualler. The plea expressly states that the contract was entered into for the purpose of enabling Newman to evade that law : and the reward the plaintiff stipulates to receive for the occupation of the premises by Newman, is compounded of a compensation for the use of the premises, and a compensation for facilitating him in so illegally carrying on the business. It is said, that, though the agreement was entered into for the purpose of *enabling* Newman to do this, it did not of necessity follow that he *would* be guilty of any infraction of the law. But I think it is impossible to look at this agreement without seeing that the parties contemplated

the doing of an illegal thing, in the infraction of a law enacted, not simply for revenue purposes, but for the safety and protection of the public morals. This decision will not conflict with any of the authorities. *Smith v. Mawhood*, 14 M. & W. 452, upon which so much reliance was placed, is no doubt very good law. (a) But it is wholly inapplicable to the present case; for, this plea discloses matter clearly shewing that the plaintiff can have no locus standi in a court of law, to enforce an agreement entered into for the purpose of enabling a party to infringe a law made for the protection of public morals. I cannot conceive a party to be more conducive to the commission of an offence, than by furnishing the place in which it is to be committed. I think the case falls aptly within the principle of *Appleton v. Campbell*, 2 C. & P. 347, where Abbott, C. J., said,—‘If a person lets a lodging to a woman, to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied.’” That case shews, that, if the defendant had been party to the illegality here complained of, he could not have recovered rent from the plaintiff. [*Jervis*, C. J. Could he turn him out?] The question arose in *The Gas-Light and Coke Company v. Turner*, 7 Scott, 779, 5 N. C. 666, where, in covenant for non-payment of rent, the defendant pleaded that the indenture was made between the plaintiffs and himself, and the premises demised by them to him, *for the express purpose* of being used for and applied by the defendant to a use prohibited under a penalty by the building-act, 25 G. 3, c. 77: and it was held, that the plea was a good answer to the action. In

1854.

 FERRET
v.
HILL.

(a) In *Smith v. Mawhood*, Alderson, B., says,—“The question is, does the legislature mean to prohibit *the act done* or not? If it does, whether it be for the purpose of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it.”

1854.

FERRET
v.
HILL.

delivering the judgment of the court, Tindal, C. J., says: "The objection that has been urged on the part of the defendant, is, that this is an action founded upon a contract, and that a court of law will not lend its aid to enforce the performance of a contract between parties, which appears upon the face of the record to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. And we think, both upon authority and reason, this objection must be allowed to prevail." The authorities the court relied upon, were,—*Lightfoot v. Tenant*, 1 B. & P. 551, *Langton v. Hughes*, 1 M. & Selw. 593, and *Cannan v. Bryce*, 3 B. & Ald. 179. And his Lordship added: "It was observed in the course of the argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable, it is obvious, that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would at all events be free from the objection that the court was lending its aid to *enforce* a contract in violation of law. And, further, if an ejectment was brought by the lessors to recover possession, on the ground that the lease was void, it might be difficult for the lessee to maintain his right to hold under the lease, after having pleaded in the present action, in which he and the lessors were parties, that the indenture was void, and obtained the judgment of the court in his favour on that plea." And that judgment was afterwards affirmed by the Exchequer Chamber, on error: see *The Gas-Light and Coke Company v. Turner*, 6 N. C. 324, 8 Scott, 609, where Lord Abinger said,—“All the decisions shew, that, at com-

mon law, a contract entered into to effect an illegal purpose, is void, and cannot be enforced ; and it makes no difference that this contract is under seal. It seems to me to be a void lease : that is not denied, but is admitted by the demurrer. It is true that you cannot add to a contract under seal anything to vary the contract ; but you may shew dehors the instrument that such contract was entered into for an illegal purpose ; such proof does not vary the terms of the contract, but merely shews the illegal object." Here, the plaintiff by this action is expressly seeking to enforce the illegal contract. These cases shew, that, where *both* are parties to the illegal object, the agreement is void. Here, one party is innocent. [*Jervis*, C. J. The difficulty is, that the agreement was not void at the time of its execution.] It is submitted that it *was* void ab initio. [*Maule*, J. The objection here is, not that this was an illegal agreement, as in some of the cases cited : the ground is, that the plaintiff made a false representation to the defendant, but for which false representation the defendant would not have entered into the agreement ; and so the defendant is,—upon the principle upon which we acted in *Evans v. Edmonds*, antè, Vol. XIII, p. 777,—entitled to say that it is not his agreement. Suppose a man, when proposing to hire a house of business, falsely represents that he does not intend to melt tallow, or to carry on any other offensive or noisy trade ; or a man about to hire a furnished house represents to the landlord that he has no children, and it turns out that he has a dozen ; although there is nothing illegal in melting tallow or having a dozen children, and the *contract* is silent on the subject,—you would contend that the whole transaction is so tainted by the fraudulent representation as to be absolutely void. If the plaintiff's intention to devote the premises to an immoral use avoids the contract, no abandonment of that intention before taking

1854.

 FERET
 v.
 HILL.

1854.

FERRET

v.
HILL.

possession would set it up again.] That difficulty could hardly arise,—seeing that it is only from the subsequent conduct of the plaintiff that the prior intention is inferred. [*Jervis*, C. J. You do not contend that the bare intention in the mind of the plaintiff would avoid the contract?] No: it is not necessary to urge the argument so far. The jury have found that the plaintiff made the contract with the express intention to use the premises for the purposes of a brothel, and that he carried that intention into effect. In *Frogmorton d. Fleming v. Scott*, 2 East, 467, it was held that a rector might recover in ejectment against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the statute 13 Eliz, c. 20. The ground upon which a contract to do an act which is opposed to the general policy of the law, or prohibited by statute, is void, is thus stated by Lord Mansfield in *Holman v. Johnson*, Cowp. 341, 348,—“The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed: but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes: not for the sake of the defendant; but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defend-

ant was to bring his action against the plaintiff, the latter would then have the advantage of it: for, where both are *equally* in fault, *potior est conditio defendentis*." Is the condition of the defendant here to be worse by reason of his being no party to the immorality contemplated? In Chitty on Contracts, 4th edit. p. 570, it is said: "Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect: and the test, as to whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires to rely on such transaction in order to establish his case. In general, agreements legally formed have the force of laws over those who are the makers of them: *Modus et conventio vincunt legem*. But this rule does not apply where the interests of the public, or of morality, are affected by the contract, and may be injured by the observance of its provisions." One of the authorities referred to in support of that position, is, *Fivaz v. Nicholls*, antè, Vol. II, p. 501, where this court held, that one of two parties to an agreement to suppress a prosecution for felony, could not maintain an action against the other for an injury arising out of the transaction in which they had both been illegally engaged. Tindal, C. J., there said: "I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant. That is an objection that goes to the very root of the action. Suppose, instead of resisting the action brought against him by Rouse, the plaintiff had paid the money, he could not have recovered it back: had he attempted to do so, he would have been met by the maxim of law, *Ex dolo malo non*

1854.

 FERET
v.
HILL.

1854.

 FERRET
v.
HILL.

oritur actio. If he could not succeed in such an action, I do not see how he can recover damages in a court of law for an injury accidentally resulting from the same state of circumstances, inasmuch as he must put in the very front of his declaration the illegal agreement to which he has been a party. The case of *Simpson v. Bloss*, 7 Taunt. 246, 2 Marsh. 542, seems to me in effect to decide the present." The same principle is laid down and acted upon in *Colburn v. Patmore*, 1 C. M. & R. 73. Suppose a man contracts for the purchase of a quantity of gunpowder, *intending* to ship it for the use of a power at war with this country,—would not the seller be justified in refusing to perform his contract, upon discovering such illegal *intention*? or, in other words, would not *the contract be void*? There is no pretence for saying that the verdict was not fully warranted by the evidence.

Massey Dawson and *Giffard*, in support of the rule. There must at all events be a new trial, on the ground that inadmissible evidence was received. [*Jervis*, C. J. The object was, to shew that the plaintiff had been guilty of fraud in giving a reference to one whom he knew to be ignorant of his real character.] The evidence as to the charge before the magistrate, and as to the gaming-house transaction, was altogether irrelevant and inadmissible. [*Jervis*, C. J. There can be no doubt about that. The real question is, whether or not there was such a degree of fraud in the obtaining of the contract, as to render it void. *Cresswell*, J. If the plaintiff wilfully misrepresented to the defendant the purpose for which he required the premises, and so induced the latter to enter into the contract,—does that amount to such a fraud as will avoid it?] Assuming that the plaintiff did use the premises in the way suggested, how does that avoid *the lease*? The moment the lease was

executed, and the plaintiff let into possession under it, he had a vested interest, of which no previous concealed intention on his part to devote the premises to an illegal or immoral purpose could divest him. This is an attempt to introduce for the first time into the law of contracts, a new ground of forfeiture. The authorities referred to in Selwyn's *Nisi Prius*, Vol. I, p. 62 (11th edit.), point out clearly the sort of illegality which avoids a contract :—"The agreement must not be contaminated with, or arise out of, an illegal transaction. Hence, where an agreement was made between two parties subjects of this country, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England, it was holden that the vendor could not maintain an action for the value of the goods,—*Biggs v. Lawrence*, 3 T. R. 454. And, in a subsequent case, it was decided that the circumstance of the vendor being an inhabitant of Guernsey would not vary the case, for he was still a subject of this country,—*Clugas v. Penahuna*, 4 T. R. 467. So, where the vendor was concerned in giving assistance to the vendee to smuggle the goods, by packing them in the manner most suitable for and with the intent to aid that purpose, although the vendor was a foreigner resident abroad, and the sale and delivery of the goods were completed abroad, it was holden that the vendor could not resort to the laws of this country to give effect to his agreement,—*Waymell v. Reed*, 5 T. R. 599; cited by Lord Kenyon, *Vandyck v. Hewitt*, 1 East. 98. But the mere knowledge of the vendor that the goods were purchased for the purpose of being smuggled, is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery were completed abroad,—*Holman v. Johnson*, Cowp. 341. So, a person who sells goods knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price, if he yields

1854.

 FERRET
 v.
 HILL.

1854.

FERRET
v.
HILL.

no other aid to the illegal transaction than selling the goods, and obtaining permits for their delivery to the agent of the purchaser,—*Hodgson v. Temple*, 5 Taunt. 181. (a) But, where the plaintiff, a druggist, after the 42 G. 3, c. 38, but before the 51 G. 3, c. 87, sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*, it was holden that he could not recover the price of them: *Langton v. Hughes*, 1 M. & Selw. 593. (b) Where a contract which a plaintiff seeks to enforce, is expressly, or by implication, forbidden by the statute or the common law, no court will lend its assistance to give it effect: but, where the consideration and the matter to be performed are both legal, a plaintiff is not precluded from recovering, by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part:” per Lord Tenterden, in *Wetherell v. Jones*, 3 B. & Ad. 225. The same doctrine is laid down in Chitty on Contracts, pp. 574, 575, upon the authority of *Bowry v. Bennet*, 1 Campb. 348, and the cases cited in the note at p. 349. In Co. Litt. 206, b., it is said: “It is commonly holden, that, if the condition of a bond, &c., be against law, that the bond itself is void. But herein the law distinguisheth between a condition against law for the doing an act that is malum in se, and a condition against law that concerneth not anything that is malum in se, but therefore is against law because it is either repugnant to the state, or against some maxim or rule of law. And therefore the common opinion is to be understood of conditions

(a) See also *Johnson v. Hudson*, 11 East, 180; *Bensley v. Bignold*, 5 B. & Ald. 335; *Brown v. Duncan*, 10 B. & C. 93, 5 M. & R. 114; *Wetherell v. Jones*, 3 B. & Ad. 221.

(b) Cited by Tindal, C. J., in *De Begnis v. Armistead*, 10 Bingh. 110, 3 M. & Scott, 511, and by Lord Cottenham, C., in *Ewing v. Osbaldiston*, 2 Mylne & Cr. 86.

against law for the doing of some act that is malum in se; and yet therein also the law distinguisheth. As, if a man be bound upon condition that he shall kill J. S., the bond is void. But, if a man make a feoffment upon condition that the feoffee shall kill J. S., *the estate is absolute*, and the condition void." It is difficult to reconcile that passage,—which was cited and not repudiated in *The Gas-Light and Coke Company v. Turner*,—with a decision adverse to the plaintiff on this occasion. [Cresswell, J. Assume the contract entered into for an illegal purpose, and no possession given, could the plaintiff have compelled the defendant to let him into possession?] No. [Cresswell, J. Why not? Is it a contract, or is it not?] It is undoubtedly a contract. [Cresswell, J. If so, why may not the plaintiff maintain an action for the breach of it?] Because he would then be in the position of a man seeking the aid of the court to enable him to do an illegal act. [Maule, J. You would contend that the landlord's option is gone by the execution of the contract by letting the lessee into possession.] That is precisely the argument which is sought to be presented to the court. [Cresswell, J. If the defendant was induced to sign the lease by a fraudulent representation of the intended lessee, does his signature constitute any contract at all? Maule, J. There is much difficulty in saying, that, where the party meant to sign the very paper he did sign, the circumstance of his signature having been obtained by means of a fraudulent representation will enable him to repudiate the contract, after he has once determined his option by giving the other party possession under it.] "It is much better," as is observed by Parke, B., in delivering the judgment of the court in *Hart v. Windsor*, 12 M. & W. 68, 88, "to leave parties in every case to protect their interests themselves by proper stipulations; and, if they really mean a lease to be void by reason of any unfitness

1854.

FERRET

v.

HILL.

1854.

 FERRET
 v.
 HILL.

in the subject for the purpose intended, they should express that meaning." Whence the necessity for inserting special covenants in leases, not to use the premises in a particular manner, if the mere illegal use of them will avoid the lease? [*Maule*, J. The covenants you allude to are covenants restraining the lessee from carrying on particular trades not illegal in themselves. (a)] Assuming that there was misrepresentation, it is in a matter that is quite collateral to the contract. In *Emanuel v. Dane*, 3 Campb. 299, where the plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver,—it was held that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. And Lord Ellenborough said: "Shew me that the defendant entered into a conspiracy to cheat the plaintiff in this transaction, and perhaps you may rescind the contract entirely, on the ground of the gross fraud committed by one of the contracting parties. But, unless the contract be rescinded, this action cannot be maintained. The watch remains the property of the defendant, though the plaintiff be entitled to a compensation in damages for a breach of the warranty that the candlesticks were of silver. I cannot try a question of warranty in an action of trover." So, here, if the plaintiff infringes the law, he will be amenable to the law. But the contract remains. Suppose a devise obtained by means of a fraudulent representation, to the prejudice of the heir-at-law,—could the fraud be set up on an issue of *devisavit vel non*? In *Mason v. Ditchbourne*, 1 M. & Rob. 460, to an action upon a bond given by the defendants for payment of money for the purchase of the business of the testator of the plaintiffs, who had been an at-

(a) In some of Sir Richard Sutton's leases, there is an express covenant providing against the use to which these premises appear to have been put.

torney, the defendants pleaded that the bond was obtained by the fraud and covin of the testator; and at the trial they proposed to shew that the bond had been obtained from them by a fraudulent misrepresentation of the extent and nature of the business which they were contracting to buy of the testator. It was proved by the witness who proved the execution of the bond, that both the defendants were fully acquainted with the contents of the bond, and that in fact it had been prepared by one of them. Lord Abinger said: "My opinion is, that the defence you rely upon is not open to you on this record. The old books tell us that the plea of fraud and covin is a kind of special non est factum, and it ends 'and so the defendant says it is not his deed.' Such a plea would, I admit, let in evidence of any fraud in the execution of the instrument declared upon: as, if its contents were misread, or a different deed were substituted for that which the party intended to execute. You may perhaps be relieved in equity: but, in a court of law, it has always been my opinion that such a defence is unavailing, *when once it is shewn that the party knew perfectly well the nature of the deed which he was executing.*" And, upon a case of *D'Aranda v. Houston*, 6 C. & P. 511, being mentioned, where similar evidence had been received upon a like plea, his Lordship added,— "I am aware that there have been cases in which it has been done; but my own opinion being decidedly against the admissibility of such a defence under this plea, I will not consume the time of the court in trying it." In the ensuing term, the defendants moved for a new trial, on the ground that the evidence of fraud had been improperly rejected: the court made the rule absolute, in order that the question might be more distinctly raised, —see 2 C. M. & R. 720 (a). The case was tried again at the sittings after Michaelmas Term, 1835, when the evidence was received: but the plaintiffs had a verdict.

1854.

 FERRET
 v.
 HILL.

1854.

FERRET
v.
HILL.

In *Edwards v. Brown*, 1 C. & J. 307, it was held, that, where a party who executes a bond is at the time competent to execute it, he cannot under the plea of non est factum shew that he was misled as to the legal effect of the bond. "I agree," said Bayley, B., "with my Brother Russell, that, whatever shews that the bond *never was the deed of the defendant* may be given in evidence upon non est factum. But, if the party actually executes it and was competent at the time to execute it, and was not deceived as to the *actual contents* of the bond, though he might be misled as to the *legal effect*, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, *the deed of the defendant*, and he is not at liberty, upon the plea of non est factum, to say that it was not." The agreement having been made, and the plaintiff once let into possession under it, and so having become seised of the term,—how can his legal interest in the term be affected by some antecedent collateral fraud?

JERVIS, C. J. I must confess I have entertained considerable doubt during the course of the discussion; but the argument of Mr. Giffard has satisfied me that this rule ought to be made absolute. It is unnecessary to pronounce any opinion upon some of the points which have been suggested. In the first place, it was urged that certain evidence as to a criminal charge made against the plaintiff before a magistrate, and as to his having been fined for being found in a common gaming-house, which was offered for the purpose of depreciating the plaintiff's character, was improperly admitted. And, further, it was said that there was no evidence in this case of fraud. I incline to think the evidence alluded to was inadmissible: and I think there was abundant evidence of fraud. But it is unnecessary to give any

distinct decision upon either of those points, because I am of opinion, that, assuming the evidence in question to have been properly received, and assuming that the plaintiff was guilty of a fraudulent misrepresentation when he said that his object in taking the premises, was, that he might carry on therein the perfumery business, when he really intended to devote them to the infamous purpose to which the jury found he intended to devote them and did devote them, the plaintiff still is entitled to recover in this action. Mr. Raymond contended that an agreement to let apartments to be used by the tenant for immoral purposes, is an illegal and void agreement; that the defendant was justified in forcibly evicting the plaintiff the moment he discovered the improper use he was making of the apartments; and that, if we hold the plaintiff entitled to recover, and so reinstate him in the possession, we shall be lending our aid to the enforcing an agreement that is tainted with fraud and illegality. I thought at first that that argument presented the true view of the case. But the argument of Mr. Giffard has convinced me that the real question is, whether, the agreement having been made, and the term vested in the plaintiff, and the plaintiff having been once let into possession, the estate has not so passed as to prevent its being divested by a collateral fraud. There can be no doubt whatever that the defendant intended to do, and in fact did do, everything that was requisite to constitute a valid lease. He executed the instrument,—an instrument sufficient for the purpose of conveying the term,—well knowing its effect; and he delivered possession of the premises to the plaintiff, with the intention of passing the term to him, if any were created by the instrument. What is there to avoid that, or to divest the plaintiff of the interest which has passed to him? The defendant seeks to dispossess the plaintiff, not by reason of any misrepresentation as to the legal effect of

1854.

 FREET
v.
HILL.

1854.

FERRET
v.
HILL.

the contract he was entering into, but because the plaintiff, at the time of the negotiation for the lease, represented (falsely, it may be,) that he was about to use the premises for a particular purpose. That was, as Mr. Giffard justly observes, a representation as to something altogether collateral to the contract. I do not think that the immoral intention in the mind of the plaintiff at the time, or the immoral use made by him of the premises after he got possession, can have any effect at all upon the validity of the contract. In the cases relied on for the defendant, the aid of the court was invoked to enforce a contract which was either contrary to public policy or contrary to some statute. Thus, in *Ritchie v. Smith*, antè, Vol. VI, p. 462, the plaintiff was seeking to enforce the payment of rent under an agreement which was an express violation of a positive law. So, in *The Gas-light Company v. Turner*, 5 N. C. 666, 7 Scott, 779, and 6 N. C. 324, 8 Scott, 609, there was not, as here, a mere intention on one side to do an illegal act, but the lease which the plaintiffs were seeking to enforce was executed by both parties for the express purpose of carrying into effect something which was prohibited by law. Here, the lease upon the face of it is a perfectly valid one. A bare intention such as is shewn here is not enough to avoid it. The defendant intended to demise the premises to the plaintiff, and he did all he could to carry that intention into effect. The plaintiff entered under that demise, and became possessed of the term. I therefore think his title to maintain this ejectment cannot be impeached in a court of law.

MAULE, J. I am of the same opinion. The plaintiff is not calling upon the court to enforce any agreement at all. The agreement was an agreement on the part of the defendant to demise certain premises to the plain-

tiff for a given term. When the instrument was executed, and possession was given under it, it received its full effect : no aid of a court of justice was required to enforce it. This action of ejectment is brought, not for the purpose of enforcing the agreement, but the plaintiff asks the court to afford him a remedy against one who has extruded him from a lawful possession. There is therefore a manifest distinction between this case and those where the court was called upon to assist the plaintiff in enforcing an agreement the object of which was to do an illegal act, as in *Ritchie v. Smith*. In that case both plaintiff and defendant were parties to an agreement, the very object and intention of which was, to enable one of them to commit an infraction of the law. If the court there had refused to listen to the defence, they would have been helping the plaintiff to enforce something which lay in contract, viz. the payment of rent, when both parties to the agreement were intending to apply the premises to an illegal purpose : the plaintiff was seeking to enforce the performance of an illegal agreement. Such also was the case of *The Gas-Light and Coke Company v. Turner*. Here, it is said, not that the defendant did not intend to create the term and to vest the interest therein in the plaintiff, but that the execution of the instrument by which that interest in the premises was conveyed to the plaintiff, was procured by means of a fraudulent representation as to the plaintiff's intention. But, however fraudulent and immoral the plaintiff's conduct may have been, I am aware of no authority which supports the position that the plaintiff's title can be impeached in a court of law by shewing that the deed under which he claims has been obtained by such fraud. I think it would lead to most inconvenient and mischievous consequences, if we were to hold that a title once vested might afterwards be impeached, on the ground that one of the contracting parties had been induced by a fraudulent representation of the other as to

1854.

 FERRET
v.
HILL.

1854.

FERRE
v.
HILL.

the uses to which he meant to apply the premises, to execute the conveyance. The defendant's proper remedy, if any, is in a court of equity. With respect, therefore, to the misrepresentation, I conceive that the defendant, if he has been imposed upon, might have a remedy against the plaintiff: but I think it cannot be said that the term did not pass. As to the plaintiff's intention at the time of the contract,—I think neither that nor the use he made of the premises subsequently will avoid the lease. The plaintiff was to have some *locus poenitentiae*: it is not to be presumed that he will continue to do that which is unlawful.

CRESSWELL, J. I concur with my Lord and my Brother Maule in thinking that this rule ought to be made absolute. The subsequent user of the premises for the illegal and immoral purpose suggested, will not avoid the lease: still less will the intention so to use them. The only question is, whether the fraudulent representation made for the purpose of inducing the defendant to grant the lease, will prevent its having effect. I think the argument of Mr. Giffard, and the cases he has cited, clearly shew that the plaintiff's misrepresentation of the purpose for which he wanted the premises, has not the effect of preventing the term from vesting in him.

CROWDER, J. I am of the same opinion. At the trial, it appeared to me that the cause was absolutely undefended. The lease was executed by the defendant with full knowledge of what he was about. The only ground upon which it was sought to be impeached, was, that the plaintiff had misrepresented the purpose for which he wanted the premises, and his intention to put them to an immoral use. I was pressed by Mr. Chambers to leave to the jury the two questions I did leave, viz. whether the defendant was induced by the plaintiff's false representations to grant him the lease,

1854.

FERRET
v.
HILL.

and whether at the time he hired the premises he intended to use them for immoral purposes. I thought at the time, and I still think, that there was no defence. It seems to me to be perfectly clear, that, notwithstanding the falsehood of the plaintiff's representations and the iniquity of his intentions, the term passed by the lease, an interest was created in the plaintiff, from which he was illegally expelled. The plaintiff's fraudulent representations and intentions led to an inquiry that was wholly collateral. The case is in no degree varied by the fact that the plaintiff is seeking by this action to regain the possession of which he has been deprived. He is not calling upon the court to aid him in enforcing or carrying into effect an illegal agreement: all he seeks, is, to recover the possession of premises to which he is lawfully entitled. His misrepresentation will not prevent the demise from taking effect. Suppose the defendant had, instead of turning the plaintiff out, brought an ejectment, would not the agreement have afforded a good answer? No case has been cited to shew that it would be any answer, that the lease was obtained by a false representation. All those referred to were very different from this case: they were all cases where the aid of the court was invoked for the purpose of carrying into effect an illegal agreement into which the parties had entered. No intention existing in the plaintiff's mind could make the contract void. He might have repented. For these reasons, I am of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

Montagu Chambers, for the defendant, prayed that the execution might be stayed, in order to give the defendant an opportunity of going to a court of equity.

1854.

FERRET
v.
HILL.

JERVIS, C. J. I do not see what power we have to do that which is asked. The case must take its ordinary course.

The rest of the court concurring,

Application refused.

GALLOWAY and Another v. KEYWORTH and Others.

May 26.

Where a witness is rejected at nisi prius, and the ruling of the judge is acquiesced in by the parties, or upheld by the court, the expenses of his attendance are not allowed on taxation as between party and party.

So, where the witness is rejected by an arbitrator, whether upon a sufficient or insufficient ground.

A cause was called on at the assizes, and referred to a lay arbitrator. On the hearing before him, a scientific witness

was tendered on the part of the plaintiff, and rejected by the arbitrator, on the ground that, being himself a scientific man, he did not need the witness's assistance:—Held, that the master, on taxation as between party and party, properly disallowed the expense of the witness's attendance as well at the assizes as before the arbitrator.

As to the right of a lay arbitrator to avail himself of, and to charge for, professional assistance in preparing his award,—*quære?*

At all events, the charge must be reasonable.

Where a lay arbitrator charged *fifty guineas* for four meetings, the master declined, on taxation as between party and party, to allow anything in addition (except the stamp-duty) for the charges of an attorney for preparing the award:—A rule to review refused.

named Armstrong, as well at Liverpool as before the arbitrator at Bolton; but whose evidence the arbitrator declined to receive. It was urged that Armstrong, who was a boiler engineer, had attended by the advice of counsel, who considered him a material and necessary witness to prove the amount of saving effected by the plaintiffs' invention. On the other hand, it was submitted that Armstrong's evidence could not be material or useful, inasmuch as he did not appear ever to have seen the boilers at work. The master disallowed Armstrong's expenses, on the ground that his evidence had not been received by the arbitrator.

The plaintiffs also claimed a sum of 71*l.* 14*s.* 5*d.* which they had paid, on taking up the award, to the attorneys who had been employed by the arbitrator to draw it. This sum consisted of 52*l.* 10*s.*, the arbitrator's charge, and 19*l.* 5*s.* 6*d.*, the attorneys' bill. This last-mentioned charge the master disallowed, with the exception of 1*l.* 15*s.* for the stamp-duty, on the ground, as was alleged, that an arbitrator is not entitled to charge for professional assistance in preparing his award.

Atherton, in Easter Term last, moved for a rule to shew cause why the master should not review his taxation in respect of these two items. He submitted, that, inasmuch as the charge for the attendance of the scientific witness would have been allowed if the cause had been tried before a jury, there was no reason for excluding it, merely because the arbitrator, himself a man of scientific knowledge, did not require his assistance. [*Cresswell*, J. The contract was for a known article, and would be well performed by the delivery of the articles, and shewing that they were patent boilers.] The only matter in issue was the amount of saving in fuel; and that could only be ascertained by actual experiment or the opinions of experts. Then, as to the costs of the award,

1854.

 GALLOWAY
 v.
 KEYWORTH.

1854. —where a lay arbitrator is employed, not only is he justified, but he is obliged to obtain the assistance of a professional man in the preparation of his award,—
 GALLOWAY
 v.
 KEYWORTH.
 Russell on Awards, 204: and there can be no pretence for saying that that is to be done at his own expense. [*Jervis*, C. J. I certainly never heard of a charge for drawing an award. The course here pursued gives the attorneys a lien upon the award for their bill. However, as there must be a rule on the other point, this one may be discussed also; but I would not be understood as holding out any hope of success.] A rule nisi having been granted,

Watson now shewed cause. It is entirely in the discretion of the master, regard being had to the matters in issue, and to the facts which the witness is called to prove, to say whether or not he is a material witness. Now, whether the plaintiffs' patent was a good one or not, was not the question: the whole contest between the parties was as to the amount of saving in fuel effected by the newly constructed boilers over the old ones. That could be tested only by experience. It was useless, therefore, to bring a man like *Armstrong*, who, whatever amount of skill and scientific knowledge he might possess, knew absolutely nothing of the fact. [*Maule*, J. The arbitrator rejected him because he was immaterial. He rejected him, perhaps, for a bad reason; but there was a good one, viz. that he was not admissible. *Jervis*, C. J. Where the judge at nisi prius rejects a witness, right or wrong, the master never allows for his attendance.] Then, as to the charge for preparing the award,—it appears that there were four meetings before the arbitrator, for which he has charged 50 guineas: that surely is a sum amply sufficient to cover the expenses of drawing the award; even if the arbitrator had a right,—which it is submitted he has not—to

employ professional assistance of that sort at the cost of the parties.

1854.

GALLOWAY
v.
KEYWORTH.

Atherton, in support of his rule. Armstrong, upon the advice of counsel, attended at the Assizes, and also before the arbitrator at Bolton; and the sole ground upon which the master declined to allow his expenses, was, that the arbitrator had not thought proper to hear his evidence, because, being himself an engineer, and therefore competent to form his own opinion upon the subject, he did not choose to avail himself of his assistance. However that might justify the disallowance of the expense of Armstrong's attendance before the arbitrator, it clearly could not disentitle the plaintiffs to the witness's attendance at Liverpool. Whether Armstrong was a material witness or not, it is unnecessary now to argue: the plaintiffs were not heard on that before the master; the consideration of that question was dismissed by him upon an erroneous ground. [*Jervis*, C. J. If the master's conclusion is correct, it matters not what reason he assigns. If the cause had been tried in the usual course, and the judge had rejected Armstrong's evidence, you could not have had the costs.] No doubt that is so, whether the decision of the judge was right or wrong. [*Maule*, J. The court does not sit strictly as a court of appeal from the decision of the master. Costs of increase are allowed at the discretion of the court; but that discretion is, for convenience sake, exercised through the master. The court has still an original jurisdiction. You may now urge that the expense of the witness's attendance ought to have been allowed, on the ground that he was a material witness.] Assuming it to be necessary to go into the question of materiality, it is submitted that Armstrong was a proper person to be called as a witness. The professional skill and knowledge he possessed would enable

1854.
GALLOWAY
v.
KEYWORTH.

him to say what in the ordinary use of a boiler constructed upon the plaintiffs' principle would be the saving effected in the consumption of fuel. The next question is, whether or not a lay arbitrator is justified in making a charge for professional assistance in the preparation of his award. The master allowed only the price of the stamp, on the ground that the arbitrator is bound to prepare the award himself. This, it is submitted, is a most inconvenient as well as a novel conclusion. [*Jervis*, C. J. The arbitrator, by placing the award in the hands of an attorney, gives him a lien upon it for *his* charges. Surely that cannot be correct. Mr. *Cancellor* stated that he declined to allow the attorneys' charges, because he thought the 50 guineas quite enough to cover all the expense of the reference and award. He further reported that he had disallowed Armstrong's expenses on the same ground that they would have been disallowed if he had been called as a witness at the trial and rejected by the judge,—conceiving that the rejection by an arbitrator was the same in this respect as the rejection by a judge. *Maule*, J. It is no part of the master's functions to lay down any general principles: all that he has to deal with, is, the particular case before him.] The master's report, it must be conceded, is conclusive as to the charges for preparing the award: but the taxation should be reconsidered as to the other point,—at all events, so far as relates to the expenses of Armstrong's attendance at Liverpool, as to which the same objection does not apply as to his attendance at Bolton.

JERVIS, C. J. I am of opinion that this rule must be discharged. Mr. Atherton now admits that his application fails so far as regards the second ground, viz. the charges of the attorneys for preparing the award, because the master, as he reports to us, very properly considered

that the arbitrator's charge of 50 guineas for four meetings was amply sufficient to cover all the expenses he might fairly incur in obtaining the aid of a professional adviser. As to the other ground of the motion,—I have always understood the rule to be, that, where a witness is rejected at the trial, and the decision of the judge is not appealed from, the party calling him is not allowed his expenses. And it seems to me that there is no distinction in this respect between the case of a witness rejected by a judge and one rejected by an arbitrator, who is placed by the parties in the position of a judge, with all his powers and authority, and something more. We are not at liberty to go into the reasons for the witness's rejection. Upon this short ground, therefore, which is of universal application, I think the rule must be discharged.

1854.

 GALLOWAY
 v.
 KEYWORTH.

MAULE, J. I am of the same opinion. There seems to have been some mistake in supposing that the master intended to lay it down as a general rule, that a lay arbitrator cannot avail himself of the assistance of a professional adviser in the preparing of his award. And, even if he had done so, I apprehend it would of itself be no ground for sending the matter back to him; the plaintiffs must have shewn, not only that there is no such general rule, but, further, that there is no such rule as applicable to this particular case. There is in truth no substantial difference between what the master has reported to us, and what was supposed to have been his mode of dealing with the matter. As to the witness Armstrong, I am disposed to think that he was not a witness the expense of whose attendance could properly have been allowed as between party and party. He seems to have been brought rather for the purpose of watching the evidence which might be given on the other side, than for any useful purpose for which his own tes-

1854.

GALLOWAY

v.

KEYWORTH.

timony could have been required. I entirely concur in the opinion expressed by the Lord Chief Justice as to the effect of the rejection of a witness by an arbitrator. One of the most important functions of an arbitrator is, to decide finally between the parties. The object of referring a matter to arbitration, is, the substitution for the ordinary course of judicial investigation, a more prompt, though possibly a less accurate, mode of decision. The arbitrator has power to determine every matter of law which may incidentally arise before him: the parties select him for their judge, subject to all the consequences which legally flow from his decision. Being thus competent to decide upon the admissibility of the witness, the arbitrator decides that he is inadmissible, and accordingly rejects him. It is said, that, in so doing, the arbitrator assigned a bad or an insufficient reason. Be his reason good or bad, we can only look to his decision. By the consent of the parties, that is to be final. It being, therefore, perfectly competent to the arbitrator to decide that the witness in question was not an admissible witness upon the issues joined in this cause, and he having so decided, the expenses of his attendance to give evidence were properly disallowed.

CRESSWELL, J. I am of the same opinion. As to the charges of the attorneys for preparing the award, I think the master was perfectly justified in holding, that, where a lay arbitrator charged fifty guineas for four meetings, no further charge should be made for professional assistance in preparing the award. As to the witness, it is perfectly clear that a rejected witness cannot be charged for, whether rejected at nisi prius or by an arbitrator. The principle is the same in both cases.

CROWDER, J. I am of the same opinion. Upon the report made by the master of what took place before

him, I think the attorneys' charges for preparing the award were properly disallowed; and it is quite unnecessary to enter into a discussion as to the propriety of allowing a lay arbitrator to obtain and to charge for professional assistance in preparing his award. As to the other point,—I should not feel disposed to decide that Armstrong was an inadmissible witness. I prefer to rest the determination of this rule upon the ground that the arbitrator assumes the functions of a judge in all respects; and, inasmuch as the costs of a witness rejected at *nisi prius* are disallowed on taxation as between party and party, so the master has rightly disallowed the expenses of the witness in this case because rejected by the arbitrator.

1854.

 GALLOWAY
v.
KEYWORTH.

Rule discharged, with costs. (a)

(a) As to the remedy in the case of an excessive demand by an arbitrator, see *Miller v. Robe*, 3 Taunt. 461, *Fitzgerald v. Graves*, 5 Taunt. 342, *Muselbrook v. Dunkin*, 2 M. & Scott, 740, 9 Bingham. 605, 1 Dowl. P. C. 722, *Macarthur v. Campbell*, 5 B. & Ad. 518, 2 N. & M. 444, *Brazier v. Bryant*, 3 M. & Scott, 844, 2 Dowl. P. C. 757.

1854.

June 5.

SMITH v. ELDRIDGE and Another.

A. entered into an agreement (in writing) with B. to take certain premises, at a certain yearly rent,—the premises to be put into repair by B., and the rent not to be payable until the repairs were completed. A., by his tenant, occupied the premises for six months, and then quitted, the stipulated repairs not having been done:—Held, that B. was entitled to maintain an action for use and occupation, as upon an *implied* agreement to pay so much as the occupation might be reasonably worth.

THIS was an action of debt for use and occupation to which the defendants pleaded never indebted.

The cause was tried before Williams, J., at the first sitting in London in this term.

The plaintiff was a builder at St. Leonard's: the defendants were brewers. The action was brought to recover a half-year's rent of a house at St. Leonard which was built for a beer-shop. It appeared that the defendants had taken the premises in an unfinished state, under an agreement by which it was stipulated that the landlord was to do certain repairs, and, among the rest, to put the drainage into a condition to satisfy the local board of health; the rent to be 55*l.* per annum until a public-house licence should be obtained, and after the licence obtained, 65*l.* per annum,—the rent to commence when the repairs were completed.

Under this agreement, the defendants by one Bennett their tenant, took possession; and Bennett and his family occupied the premises, and carried on business therein for six months, and then quitted, on the ground that the repairs had not been done as agreed, and that the premises were not habitable by reason of the defective drainage.

For the defendants, it was submitted that the plaintiff must be nonsuited, inasmuch as it appeared from the agreement that no rent was payable until the house was completed.

The learned judge told the jury that the agreement did not preclude the plaintiff from recovering a reasonable sum for the occupation of the premises, if the defendants thought fit to enter upon them before the repairs were done: and he left it to them to say whether

the defendants did not take possession under an implied agreement to pay what the premises were reasonably worth.

The jury returned a verdict for the plaintiff, damages 30*l*.

1854.

SMITH
v.
ELDRIDGE.

Malcolm Kerr, on a former day, moved to enter a non-suit, pursuant to leave, or for a new trial. By the express terms of the agreement, which contemplated a present occupation of the premises, no rent was to be payable until the stipulated repairs were completed: and, those not having been done, the plaintiff was not in a condition to call upon the defendants for rent. [*Maule, J.* Suppose the drainage, and the other matters the omission to do which was complained of, were not necessary to be done to *complete* the premises according to the agreement, the plaintiff would be entitled to a half-year's rent, as contradistinguished from a compensation for use and occupation. My Brother Williams thought, that, assuming the premises were not completed so as to entitle the plaintiff to claim *rent* under the agreement, the defendants might still have occupied under an implied agreement to pay so much as the occupation might be reasonably worth: and he so left the question to the jury. Bennett and his family resided in the house, and sold beer, with more or less success, for a period of six months. The defendants, therefore, had a beneficial occupation, for which they ought to pay.] There was no occupation at all, except under the agreement.

The court intimated a desire to confer with Mr. Justice Williams; and now

JERVIS, C. J., said:—We have seen my Brother Williams. He says, that, if the defendants did not enter under the agreement, there was evidence whence it might be inferred that they, by their tenant Bennett, entered

1854.

SMITH
v.
ELDRIDGE.

under an implied agreement to pay so much as the occupation was reasonably worth. And he reports to us that he was satisfied with the verdict. As we see no reason to find fault with the way in which the case was left to the jury, there will be no rule.

Rule refused.

Ex parte CHILD.

June 15.

A rule having been obtained for a habeas corpus to bring up a lunatic confined in an asylum in this country under Irish medical certificates,—the Court discharged it with costs, there being no affidavit to shew that the party promoting the application was duly authorized by the lunatic.

BYLES, Serjt., on a former day in this term, obtained a rule calling upon Francis James Lord to shew cause why a writ of habeas corpus should not issue, to compel him to bring up the body of Captain Child, who was detained in a lunatic asylum at Hayes Park, Middlesex, kept by Lord.

The affidavits upon which the motion was founded, were those of one Mead, who described himself as the attorney for Captain Child, and who stated that the only certificates under which Captain Child was detained, were those of two medical practitioners in Dublin; and of Dr. Buchanan and Dr. Barnes, who deposed as to the present state of mind of Captain Child.

The learned Serjeant submitted that an Irish certificate does not justify the detention of a party as a lunatic in this country,—referring to the statute 8 & 9 Vict. c. 100, ss. 45, 46, 47, 117, and to the case of *In re Shuttleworth*, 9 Q. B. 651.

Montague Smith, who appeared to shew cause, objected that there was no affidavit shewing that the application was made with the sanction of Captain Child, or that Mead had any authority to appear and act as his attorney. He referred to *In re Parker*,—the Canadian Prisoners' case,—5 M. & W. 32, where the court of Ex-

chequer said,—“ Before granting a habeas corpus to remove a person in custody, we must ascertain that an affidavit is not reasonably to be expected from him. An affidavit is absolutely necessary, either from the party who claims the writ, or from some other person, so as to satisfy the court that he is so coerced as to be unable to make it.

1854.

Ex parte
CHILD.

Byles, Serjt., admitted that his affidavit did not sufficiently shew that the application was authorised by Captain Child.

JERVIS, C. J. I think my Brother Byles has not put himself in a condition to ask for the writ. A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by habeas to be discharged from restraint. For anything that appears, Captain Child may be very well content to remain where he is. The rule must be discharged; and, as Mr. Lord has been put to the expense of coming here fruitlessly and unnecessarily, it must be with costs.

The rest of the court concurring,

Rule discharged, with costs.

Smith asked that the costs of the rule might be ordered to be paid by the attorney.

Sed per Curiam. We cannot do that.

1854.

May 31.

In an action upon an award, the declaration alleged that certain differences between the plaintiff and defendant had been referred, and that the arbitrator had awarded that certain sums should be paid at certain times by the defendant to the plaintiff, and assigned for breach non-payment of an instalment. The defendant pleaded, setting out the award verbatim, and concluding in the form of a demurrer, "that the said declaration is not sufficient in law;" and the plaintiff joined in demurrer:—

Held, that the demurrer was informal,—the instrument as set out (since the Common Law Procedure Act, 1852,) forming part of the *plea*,—and consequently there being nothing to shew the declaration bad.

SIM v. EDMANDS.

THE declaration, upon an award, stated, that certain differences existing between the plaintiff and the defendant had been submitted to arbitration, and that the arbitrator had awarded certain sums to be paid at certain times by the defendant to the plaintiff, and assigned for breach the non-payment of an instalment.

Plea, that the said award was and is in the terms following,—setting it out verbatim, and concluding in the form of a demurrer, "that the said declaration is not sufficient in substance."

The plaintiff joined in demurrer.

Horace Lloyd, in support of the demurrer. The award as set out shews that the plaintiff has no cause of action: it does not determine that any sum of money whatever was due and payable from the defendant to the plaintiff. [*Jervis*, C. J. Had you not better shew first that you are in a situation to demur to the declaration? Under the old system of pleading, you might set out the document on oyer, making it part of the previous pleading, and then demur if the document so set out shewed no cause of action, or no defence: but, by the 55th and 56th sections of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76 (a), profert and

(a) The 55th section enacts, that "it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and, if profert shall be made, it shall not entitle the opposite party

to crave oyer of or set out upon oyer such deed or other document."

And s. 56 enacts, "that a party pleading in answer to any pleading in which any document is mentioned or referred

oyer are abolished, and documents set out are to be taken as part of the pleading in which they are set out.] In *Wood v. The Copper Miners' Company*, antè, Vol. XIV, p. 428, the defendants had the benefit of an instrument set out in their plea as this is. [*Crowder, J.* There, the *plaintiff* demurred to the plea which set out the agreement.] If the demurrer be informal, the plaintiff might have gone to a judge at Chambers to have it set right, under s. 52 (a), instead of joining in demurrer. [*Atkinson, Serjt.* If the plaintiff had not joined in demurrer, it would have been a discontinuance.] If the plaintiff had demurred to the plea,—the demurrer having been struck out,—the same question would have been presented. [*Jervis, C. J.* If the plaintiff had gone to a judge at Chambers, as you suggest, the judge would only have done what we must now do.] The case of *Jeffery v. White*, 2 Dougl. 476, is to a certain extent in point. That was an action of trespass for taking cattle, to which the defendant pleaded that they were taken damage feasant: the plaintiff replied, a right of common: the defendant rejoined, stating by way of inducement part of a private act of parliament for inclosing the common, and an allotment by the commissioners of the locus in quo to the defendant, and traversing the right of common: the plaintiff prayedoyer of the act, and it was granted, and the whole act set forth, and then he demurred to the rejoinder, as-

1854.

SIM
v.
EDMANDS.

to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is "set out."

(a) "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial

of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit."

1854.

 SIM
 v.
 EDMANDS.

signing for cause that it was not shewn by the rejoinder that the allotment had been made according to the directions of the act as set forth: *the defendant joined in demurrer*. It was argued, for the defendant, "that a party is not entitled to oyer of acts of parliament, and that it cannot be granted, because they are not in the power of the court; and, for a similar reason, the party who relies upon them cannot make profert, because he has them not to produce: that the plaintiff ought to have pleaded the record of the act in a surrejoinder, and thereby have given the defendant an opportunity to take issue upon it: that, by the plaintiff's setting it forth upon the oyer, and then demurring, the plaintiff was precluded from that advantage, and the plaintiff enabled to state it in whatever manner he pleased: that the court, therefore, ought to consider the oyer and recital of the act as a mere nullity: and that, upon what appeared in the defendant's rejoinder, the allotment was regular, and therefore the defence was sufficient." For the plaintiff, it was admitted that oyer could not be compelled of an act of parliament; but it was inserted, that, as it had been in fact granted, the party who had demanded it was entitled to consider the whole of what was set forth as making part of his adversary's plea. And the plaintiff had judgment. [*Jervis*, C. J. Could you have pleaded that the arbitrator did not make the award, and then demurred?] Certainly not. [*Jervis*, C. J. Then, you cannot set out the award, and demur. There is nothing to shew the declaration bad.] That is conceded. The course adopted by the defendant is informal: but, having adopted it, the plaintiff cannot now avail himself of the informality. [*Jervis*, C. J. The rule of pleading always was, that you could not demur to a declaration because the *plea* shews something which makes the declaration untenable,—except in the case of oyer, when the document set out was taken to be part

of the declaration. That is not so now. If you had concluded with a verification, the plaintiff might have demurred, or taken issue. *Maule, J.* The legislature did not mean to alter the substance of the law enabling a defendant to get the document set out in extenso, in substitution for the statement of it in the declaration. But, the statute has so far altered the rule of pleading, that it is subject to an allegation and to proof that it is the document alleged.]

1854.

SIM
v.
EDMONDS.

PER CURIAM. (a) The declaration, for anything that appears, is good. But we think the defendant ought to have leave to amend, upon the usual terms.

Rule accordingly.

(a) The judges present being, Jervis, C. J., Maule, J., and Crowder, J.

END OF TRINITY TERM.

IN THE HOUSE OF LORDS.

THE MARQUIS OF BRISTOL and Others v. ROBINSON and
Wife.

THIS was a writ of error upon a judgment of the Exchequer Chamber, reversing a judgment of the court of Common Pleas in an action of quare impedit brought by the defendants in error to recover a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in the county of Lincoln. Vide antè, Vol. XI, pp. 208, 241.

The case was argued in the House of Lords on the 21st, 23rd, and 24th of February last, by *Cowling*, *Baily*, and *Scotland*, for the plaintiffs in error, and *Bramwell*, *G. Hayes*, and *Brewer*, for the defendants in error.

At the close of the argument, the parties agreed to a compromise, and no judgment was pronounced.

APPEALS

FROM THE DECISIONS OF REVISING BARRISTERS,

UNDER 6 & 7 VICT. C. 18,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

MICHAELMAS TERM,

IN THE

RIGHTTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES PRESENT DURING THE ARGUMENTS WERE,—JERVIS, C. J.,
MAULE, J., WILLIAMS, J., AND CROWDER, J.

City of WESTMINSTER.

1854.

GEORGE HUGGETT, Appellant; CHARLES EDWARD
LEWIS, Respondent.

Nov. 23.

GEORGE HUGGETT objected to the name of James Alford being retained on the list of persons entitled to vote at the election of members for the city of Westminster, in respect of property occupied by him in the parish of St. Clement Danes. The notice of objection was in the following form:—

“No. 10.

“Notice of objection (to overseers).

“To the overseers of the parish of St. Clement Danes.

“I hereby give you notice that I object to the name of Alford, James, being retained in the list of persons entitled, *under the reform act*, to vote in the election of

A notice of objection given to overseers, pursuant to the 6 & 7 Vict. c. 18, s. 13, and Sched. (B.) No. 3, described the party objected to as being “in the list of persons entitled *under the reform act*, to vote,” &c.:—Held, a sufficient specification of the particular list referred to.

1854. members for the city of Westminster. Dated, this 24th
day of August, 1854.
HUGGETT, App.,
LEWIS, Resp.

(Signed) "George Huggett,
of 4, Beaufort Buildings, Strand,
on the list of voters for the parish
of St. Clement Danes."

It was objected, on the part of James Alford, that the above notice was insufficient, inasmuch as it was uncertain and ambiguous, and did not comply with the direction appended to the form No. 10, Schedule (B), of the 6 & 7 Vict. c. 18, which is as follows:—"Note. If more than one list of voters, the notice of objection should specify the list to which the objection refers."

The overseers are required to make out two lists of voters for the city of Westminster, viz. one list according to the form No. 3, in Schedule (B) of the 6 & 7 Vict. c. 18, and the other according to the form No. 4, in the said schedule. The name of the said James Alford appeared only in the former list.

It was contended on the part of James Alford, that the words introduced into the form of the notice of objection, and which are printed in italics, "*under the reform act*," was not a sufficient compliance with the note appended to the said form No. 10, Schedule (B).

The revising-barrister decided that the notice was insufficient.

The cases of twenty-four other persons depending upon the judgment in the principal case, were consolidated therewith.

If the court should be of opinion that the said notice of objection was sufficient, the name of James Alford, and also the names of the other persons named in the list annexed to the case, were to be expunged from the list of voters for the city of Westminster.

Whitmore, for the appellant. The notice of objection

was a sufficient compliance with the statute: it points out in language that cannot be mistaken the particular list to which the objection refers, viz. the list the form of which is given in Schedule (B), No. 3,—the list of persons entitled to vote for the city “by virtue of an act passed in the second year of the reign of King William the Fourth, intituled ‘An act to amend the representation of the people in England and Wales,’” which is popularly called “The Reform Act.” In *Allen*, App., House, Resp., 8 Scott, N. R. 987, 7 M. & G. 157, 1 Lutw. Reg. Cas. 255, an objection of this sort was disallowed. There, in a borough where two lists are made out by the overseers,—one, of parties entitled to be registered under the 2 W. 4, c. 45, s. 27, the other of potwallers,—a notice of objection to the name of a party being retained “on the list of persons entitled to vote as householders in the election,” &c., was held sufficient, though the words “as householders” do not occur in the form given by the 6 & 7 Vict. c. 18; it not appearing that the party could have been inconvenienced or misled by the introduction of those words. And Cresswell, J., said: “If this departure from the prescribed form had been calculated to invite the attention of the party to a wrong list, I think the notice would have been bad. But this notice could not possibly have that effect.” So, in *Feddon*, App., *Sawyers*, Resp., antè, Vol. XII, p. 680, 2 Lutw. Reg. Cas. 246, a notice of objection to a party’s right to vote in the election of members for the city of C., described the objector as being “on the list of freemen for the city of C.” There are several townships in C., the overseers of which severally make out and publish lists of persons entitled to vote in respect of occupation; and there is also a list made out and published by the town-clerk, which is intituled “*The list of freemen of the city of C., entitled to vote in the election of members for the said city.*” Under the Municipal Corporation Act,

1854.

HUGGETT,
App.,
Lewins,
Resp.

1854.

HUGGETT,
App.,
LEWIS,
Resp.

5 & 6 W. 4, c. 76, s. 5, the town-clerk also makes out and keeps (but does not publish) a list of the freemen of the city, called "The freemen's roll." And it was held by this court,—Maule, J., dissenting,—that the above notice of objection was a sufficient compliance with the statute, inasmuch as any person reading it must understand that the objector intended to state that his name was on the list of freemen entitled to vote in the election of members.

Macnamara, for the respondent. The notice in question does not sufficiently specify the list to which the objection refers. By the 13th section of the 6 & 7 Vict. c. 18, the overseers are required to make out "according to the form numbered 3, in the schedule (B) to this act annexed, an alphabetical list of all persons who may be entitled to vote in the election of a member or members to serve in parliament for such city or borough, in respect of the occupation of premises of the clear yearly value of not less than 10*l.*, situate wholly or in part within such parish or township, and another alphabetical list, according to the form numbered 4, in the said schedule (B), of all other persons (except freemen) who may be entitled to vote in the election of such city or borough by virtue of any other right whatsoever." The heading of the list in Schedule (B) No. 3, is as follows,— "The list of persons entitled to vote in the election of a member for the city (or borough) of W., in respect of property occupied within the parish of A., by virtue of an act passed in the second year of the reign of King William the Fourth, intituled 'An Act to amend the representation of the people of England and Wales.' The list No. 4 is headed,— "The list of all persons (not being freemen) entitled to vote in the election of a member for the city (or borough) of W., in respect of any rights other than those conferred by an act passed

in the second year of the reign of King William the Fourth, intituled 'An Act to amend the representation of the people in England and Wales.' " The 17th section, which gives the right of objecting, requires the person objecting to give notice to the overseers "according to the form numbered 10, in Schedule (B), or to the like effect:" and, by the note appended to that form, it is provided, that, "if there be more than one list of voters, the notice of objection should specify the list to which the objection refers." And by s. 40, the party objecting is bound to prove that "he gave the notice or notices respectively required by this act." The question is, whether this notice is a compliance with the act. [*Jervis*, C. J. What should the notice have said?] It should have referred to the list of persons entitled to vote in the election of members for the city of Westminster, in respect of property occupied within a given parish, "by virtue of the reform act," using the words contained in the heading of the form No. 3, or words equivalent thereto. [*Williams*, J. Are not the words "under the reform act" equivalent to "by virtue of the reform act?"] The court has always construed these notices very strictly: *Barton*, App., *Ashley*, Resp., ante, Vol. II, p. 4, 1 Lutw. Reg. Cas. 307. Tindal, C. J., there says: "All that can be said here is, that the omission to specify the particular list did not in fact create any confusion or difficulty. But I think it is much more convenient that the overseer should have his attention distinctly called to the list, and that it is safer to adhere to the words of the act, and to hold that the notice must be in strict conformity with it in this respect." [*Jervis*, C. J. Is not this notice in as strict conformity with the notice in the schedule as can be desired?] It is submitted that it is not. Possibly it might have been sufficient if it had said "in respect of rights conferred by the reform act." [*Maule*, J. Substantially it does say so.] *Eidsforth*,

1854.

HUGGETT,
App.,
LEWIS,
Resp.

1854.

HUGGETT,
App.,
LEWIS,
Resp.

App., *Farrer*, Resp., antè, Vol. IV, p. 9, 1 Lutw. Reg. Cas. 517, also shews how great strictness is required in notices of this sort. There, the *objector* described himself in the notice as "R. F., of &c., on the list of voters for the borough of L." The register of voters for the borough of L. consists of four separate lists, viz. one of 10l. house-holders for each of three townships comprised in it, and one of the freemen of the borough. The objector's name was on the last-mentioned list only; and it was held, that he was insufficiently described in the notice, and that the inaccuracy of description was not cured by the 101st section of the statute.

JERVIS, C. J. I am of opinion that the notice of objection in this case is sufficient. The note to the form in Schedule (B), No. 10, requires the notice to specify, in case there are more lists of voters than one, the particular list to which the objection refers. Here, the list referred to is described as "the list of persons entitled *under the reform act* to vote," &c. It seems to me that that is quite as good as saying "by virtue of the reform act." The objection seems to me to be totally groundless.

MAULE, J. The notice in question seems to me to contain as full and comprehensive a description of the particular list of voters whose title to vote is conferred by the reform act, as any person could reasonably desire.

WILLIAMS, J. I am of the same opinion. I think it is quite impossible to conceive an overseer so dull as to be misled by this notice.

Appeal allowed.

1854.

County of SURREY,—Eastern Division.

WILLIAM ASTBURY, Appellant ; THOMAS HENDERSON,
Respondent.

Nov. 24.

THOMAS HENDERSON duly objected to the name of William Astbury being retained on the list of voters for the parish of Putney, in the Eastern Division of the county of Surrey.

The name of William Astbury appeared upon the list of persons claiming to be entitled to vote, thus,—

Christian and surname.	Place of abode.	Nature of qualification.	Street, lane, &c., where situate, &c.
Astbury, William	4, Munster Terrace, Fulham, Middlesex.	Two plots of freehold building land, of the clear yearly value of 40s.	Part of the Cedars, north side of Wandsworth Lane: Lots 116 and 117 at the recent sale.

The facts of the case as proved were as follows :—

A freehold estate in Putney, called "The Cedars," was purchased in 1853 by a freehold land society, and parcelled or allotted into small plots of ground for building purposes, which were soon after absolutely sold to divers persons, and the fee-simple of each lot conveyed to the purchaser thereof.

The claimant, William Astbury, became the purchaser of two lots, at the price of 150*l.* for the two, which he paid; and they were conveyed to him in fee in July, 1853. His plot of ground contained fifty-four feet frontage, by one hundred and forty-five feet in depth,

was entitled to be registered as the owner of a freehold estate of the clear yearly value of 40*s.*

The criterion of value under the statute 8 H. 6, c. 7, is not what the land actually produces, but what in its existing state it reasonably may produce.

A. bought a piece of freehold land for 150*l.*, intending it for building purposes, for which it was suitable. In a case stated by a revising-barrister, it was found, that, if let upon a building-lease, the land would be worth a ground-rent of 15*l.* a year; and that A. had received a bona fide offer of that sum, but had refused it as insufficient :—Held, that, although the land was unbuilt upon and unlet, and consequently, remained unproductive, A. was nevertheless

1854.

ASTBURY,
App.,
HENDERSON,
Resp.

or not quite one-fifth of an acre : *it is eligibly situated and adapted for building purposes, for which it was purchased, and is intended* ; and, if let upon a building-lease for ninety-nine years, would be worth an annual ground-rent of at least 15*l.* for the whole.

The claimant lately received a bonâ fide offer of 1*l.* a year ground-rent for the same, but refused it as insufficient.

No building is yet erected on this plot, and no lease thereof has been granted ; and it has remained, while in the claimant's possession, wholly unoccupied, uncultivated, and unprofitable.

If let to a tenant from year to year, or upon an ordinary occupation lease for twenty-one years, or if occupied for any purpose except building, the plot of ground would not produce a rent or profit of 40*s.* a year.

Upon other similar lots of ground on the same Cede estate, thirty-four houses of a superior class have already been built, or are building ; and other lots are actually let on building-leases at ground-rents exceeding 5*l.* each lot.

The owners of several lots so built upon or let upon building-leases were objected to, and the revising-barrister retained their names on the lists of voters. But, in the case of William Astbury,—and in the cases of six persons named in a schedule appended to the case whose freehold was not and never had been productive of any rent or profit to the freeholder, and was incapable of producing annual rent or profit to the amount of 40*s.* a year by occupation as it was, the revising barrister was of opinion, and decided, that, for the purpose of the franchise, and with reference to the statute 3 & 6, c. 7, the claimant was not entitled to be registered. And he decided that he must look to the actual annual value of the freehold for occupation as it was, and that while it remained neither built upon nor let upon lease

at a ground-rent exceeding 40*s.* a year, it was not of the annual value of 40*s.*; that he could not look to its *prospective* or *speculative value*, nor to the additional annual value which might be created in case the owner should build, or, being tenant in fee, should grant a long lease for building thereon, under which circumstances the annual value would much exceed 40*s.* He therefore expunged the names of William Astbury and the sixteen other persons above referred to from the said list of voters, directing that those cases should be consolidated with the principal case.

If the court should think the revising-barrister's decision wrong, the name of the said William Astbury, and also the names of the other persons in the annexed schedule, according to their respective descriptions therein, were to be inserted in the register of voters for the said parish of Putney.

Byles, Serjt. (with whom was *Macnamara*), for the appellant. The decision of the revising-barrister was clearly wrong. The land in respect of which the appellant claimed to be registered, formed part of an estate which had been parcelled out into plots for building purposes. It was bonâ fide purchased and intended for building-land. The revising-barrister held, that, because unbuilt upon, and not worth 40*s.* per annum if used or let for agricultural purposes, it was not sufficient to confer a vote, although the owner had received a bonâ fide offer of 15*l.* a year for it. The case raises the question,—suppose land is adapted for a particular purpose, but is not actually employed for that purpose; is the purpose for which it is intended to be looked at in order to ascertain its yearly value for the purpose of conferring the franchise? [*Jervis*, C. J. Has this man 40*s.* a year to expend, within the meaning of the 8 H. 6, c. 7?] It is submitted that he has. Would anybody give him 40*s.*

1854.

ASTBURY,
App.,
HENDERSON,
Resp.

1854. a year for his interest? The true test is that suggested by Maule, J., in *Beamish*, App., *The Overseers of Stoke*, Resp., antè, Vol. XI, p. 37, 2 Lutw. Reg. Cas. 189,—
 ASTBURY, App.,
 HENDERSON, Resp.
 “Suppose a man agreed to stand in the claimant’s shoes, would it be worth his while to give 40s. a year for his interest in the land?” And Jervis, C. J., in the same case observes,—“The case does not find that that which the party has already paid towards the purchase money is worth 40s. a year in perpetuity.” Apply that test, here the appellant has paid 150*l.*, which is worth 7*l.* 10*s.*, or at the least 6*l.* a year in perpetuity. It is not necessary that the land should actually be productive of 40*s.* per annum: it is enough if it is of that value. In *Heywood on County Elections*, p. 102, it is said, that, “if lands are let to a person for life, reserving no rent, or less than 40*s.* by the year, the grantor cannot vote during that term; but, if such lands are let only for a term of years, without any rent at all, or reserving under 40*s.* per annum, the grantor may vote in respect of the freehold in him, provided it is of sufficient value.” [*Maule*, J. It seems a curious state of things to hold that a piece of land for which a man may if he chooses get 15*l.* a year, is worth nothing.]

Corner, for the respondent. The revising-barrister properly decided that he must look to the actual annual value of the land, and not to its prospective or speculative value. The case finds that the actual value is less than 40*s.* a year. [*Williams*, J. That is, supposing the owner lets it with a prohibition to the tenant to use it for any other than its least profitable use.] The finding of the value by the revising-barrister is conclusive, unless the court can see that it is necessarily wrong: *Coogan*, App., *Luckett*, Resp., antè, Vol. II, p. 182, 1 Lutw. Reg. Cas. 447; *Hamilton*, App., *Bass*, Resp., antè, Vol. XII, p. 631, 2 Lutw. Reg. Cas. 218. [*Maule*, J. What

is the value of the fee? Here, it is more than 100*l.*; not because it produces 100*l.*, but because it is capable of producing it, if properly dealt with.] That, it is submitted, is not the true test. The question is, has the party 40*s.* a year to expend, arising out of this land? [*Maule, J.* Then, you would say, that, if a man has an arable field which is capable of producing 20*l.* a year, he is not entitled to vote in respect of it if he leaves it waste?] Precisely so. The value meant by the 8 H. 6, c. 7, is revenue. [*Maule, J.* That's quite a new doctrine. *Jervis, C. J.* I farm my own land in Kent; but I fear I may not at the end of the year be able to expend 40*s.* out of the profits. Does my bad farming deprive me of my vote?] The claimant here never having reduced this land into a state to be productive to the extent of 40*s.* a year, is not entitled to vote. [*Maule, J.* Where do you find any colour of authority for that?] There is no case exactly in point: but it is submitted that the absence of authority is a circumstance to shew that such a speculative value as this cannot sustain a right to vote. The consequence of holding the decision of the revising-barrister to be right, will only be to suspend these votes until the land is brought into a state to produce 40*s.* a year: whereas, a contrary decision will give a fictitious value to land laid out in so-called building-plots, whether intended to be built upon or not. The question is, whether property which never has been so dealt with as to be of the necessary value, is to confer the franchise, because in a possible event it may acquire that value. [*Maule, J.* The rent at which land is let is only evidence of its value.] At least, it is better evidence than an offer not accepted. The authorities as to the assessment of value under the poor-law have some bearing upon this subject: in such assessments, prospective value was never dreamt of. Thus, in *The King v. Mast*, 6 T. R. 154, it was held, that

1854.

ASTBURY,
App.,
HENDERSON,
Resp.

1854.

ASTBURY,
App.,
HENDERSON,
Resp.

every person is to be rated to the poor according to the *present value* of his estate, whether that value has or has not been increased by his own improvements. And Lord Kenyon said: "Every inhabitant ought to be rated according to the present value of his estate, whether it continue of the same value as when he purchased it, or whether the estate is rendered more valuable by the improvements which he has made upon it. If a person choose to keep his property in money, and the fact of his possessing it be clearly proved, he is rateable for that; but, if he prefer using it in the melioration of an estate or other property, he is rateable for the same in another shape. Suppose a person has a small piece of land in the heart of a town, which is only of small value, and he afterwards build on it, he must be rated to the poor according to its improved value with the building upon the land." Here, it is said that the appellant can get 15*l.* a year ground-rent; would he be content to be assessed at 15*l.* a year in respect of this land in its now existing state? Suppose there be coal or any other mineral, or brick-earth, under the land,—would it be assessable at a speculative value on that account, whilst being used for agricultural purposes? In *The King v. Attwood*, 6 B. & C. 277, 9 D. & R. 328, Abbott, C. J. says: "The legislature has expressly made coal-mines rateable, and they must be rated for what they produce, viz. the coals. Slate-quarries and brick-earth are also exhausted in a few years, but nevertheless the rate is always imposed upon that which is produced." (a) In *The Queen v. Westbrook*, 10 Q. B. 178, 200, Lord Denman says: "The rate is always imposed with reference to the existing value; whether temporary or enduring, is immaterial." And see *The Queen v. The London, Brighton, and South Coast Railway Company*,

(a) The lessee of a coal-mine no profit from the mine: *The King v. Parrott*, 5 T. R. 593.

15 Q. B. 313. In *Matthew Rolph's* case, 2 Peck. 104, the vote was objected to as being under the value of 40s. The land for which the party voted was an orchard, in quantity about one rood. Three witnesses were called, who valued it at about 20s. per annum in the state in which it was at the time of the election; but they said there had been a cottage there formerly, then in ruins, and that a new one had been built since the election. It was said that the actual value in the particular year in question was not so much the question as the reasonable value of the land, &c., in its usual state: it might happen, that very valuable property might produce nothing in the year previous to an election. It was answered, that the true criterion of the value, was, the rent which might fairly be expected for the property, not what might possibly be made by the tenant in the course of one year. And the vote was determined to be bad. It is not contended here, that the owner is to have no vote because in a bad year the land may happen to be unproductive. But it is the actual and existing, and not the future and speculative value, that is to be looked at. The case finds, that, where land similarly situated with the land in question has realized rent of sufficient amount, the revising-barrister has allowed the claim. It is submitted, therefore, that he has taken a correct view of the statute.

1854.

ASTBURY,
App.,
HENDERSON,
Resp.

Byles, Serjt., in reply. A man may have a 40s. freehold, although circumstances may prevent his deriving at the moment any profit at all from it. The cases as to rating have been held not to be applicable to questions of this sort: per Tindal, C. J., delivering the judgment of the court in *Colvill*, App., *Wood*, Resp., antè, Vol. II, p. 210, 216, 1 Lutw. Reg. Cas. 483, 489. The distinction is there expressly taken between "rateable value," and "clear yearly value."

1854.

ASTBURY,
App.,
HENDERSON,
Resp.

JERVIS, C. J. It seems to me that the appellant's vote in this case was a good vote, and consequently that the appeal must be allowed. I did not understand it to be contended seriously on the part of the appellant, that land that is altogether unproductive is capable of conferring a vote. I should not feel disposed to agree to such a proposition. It is unnecessary, however, to lay down any rule of law as to the prospective or speculative valuation of land for the purpose of conferring the franchise. It is enough on the present occasion to say that there is abundant evidence in the case before us, to shew that the plot of land in question is *worth* more than 40*s.* a year, and that it is only through the indolence or the obstinacy of the appellant that he has failed to realise that amount. He gives 150*l.* for it,—an amount which would produce upon any ordinary investment considerably more than 40*s.* a year. The case finds that he *can* let it for 15*l.* a year, but will not: and the revising-barrister held that the land did not confer a vote, simply because, if let for agricultural purposes, or for any other than building purposes, it would not realise a rent of 40*s.* That, I think, is not the true question: the true question is, what is the land reasonably worth,—what would it fetch in the market? That question is in effect decided by the revising-barrister, when he says that the land, if used for the purpose for which it was originally destined when it came into the appellant's hands, viz. to let for building, is worth at least 15*l.* per annum. I felt at the moment pressed with the argument, that the realisation of that value depends upon something to be done with the land. There must be a letting, the execution of a lease under which buildings would be erected on the land, to give it an enhanced value. But, when it comes to be considered, it is evident, that, in all cases, the value of the land depends upon something that is to be done with it by the owner. It is obvious, therefore,

that that was not the ground of the revising-barrister's decision. It seems to me that the price originally given for the land, the offer that appears to have been made and refused, and the finding of the revising-barrister, that, "if let upon a building-lease for ninety-nine years, it would be worth an annual ground-rent of 15*l.*," shew that this land is of the clear yearly value of 40*s.* and upwards, and entitles the owner to a vote within the 8 H. 6, c. 7.

1854.

ASTBURY,
App.
HENDERSON.
Resp.

MAULE, J. I think it is clear, upon the facts stated in this case, that the appellant is entitled to a vote in respect of being a freeholder who may if he will expend 40*s.* a year and above out of his freehold. It appears, that, in July, 1853, he became the purchaser of the land in question at the price of 150*l.*; that it is eligibly situated and adapted for building purposes, for which it was purchased and is intended; that, if let upon a building-lease,—that is, if applied to the purpose for which it was purchased and is intended,—it would be worth 15*l.* a year; and that the appellant has actually received a bona fide offer of 15*l.* a year for it, but refused it as insufficient. Can anybody doubt, then, that the land is worth more than 40*s.* a year? That the appellant might so dispose of the land as to render it less valuable, or wholly unproductive, there can be no doubt: but, if that were sufficient to deprive him of his vote, it would follow that a man who had an estate worth 10,000*l.* a year, might equally lose his vote by so dealing with the land as to acquire no profit from it. The revising-barrister seems to have thought, that, if the appellant had the power to let the land to a tenant from year to year, or upon an ordinary occupation lease, at a rent amounting to 40*s.* a year, the estate would be sufficient to confer a vote: but that it would be otherwise where that is to be done by a building-lease. I see

1854. no ground for the distinction. True, you cannot let
ASTBURY, land on a building-lease until you have found some one
App., willing to be lessee. It is equally true, that, until you
HENDERSON, find a tenant, you cannot create a tenancy from year to
Resp. year. I therefore think there is no reason, upon the facts
found in this case, for depriving the appellant of the
right of suffrage in respect of this property, which is
sufficient in point of value to satisfy the language as well
as the spirit of the statute 8 H. 6, c. 7.

WILLIAMS, J. I am of the same opinion. The fallacy of Mr. Corner's argument seems to me to consist in his supposing, that, by allowing this claim, we shall be assessing the land in question at its future improved value. That, however, is not so. We cannot, consistently with the facts found by the revising-barrister, come to any other conclusion than that the present value of the land far exceeds 40s. per annum.

CROWDER, J. I also think that the facts stated by the revising-barrister shew conclusively that this plot of land is worth more than 40s. a year. The purpose for which the owner may use it is wholly immaterial. The question is, what is its value. Our judgment proceeds, not on the assumption of any speculative or prospective value, but upon the value clearly and unequivocally stated in the case. The appeal must be allowed.

Appeal allowed, with costs.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
Exchequer Chamber,
IN
MICHAELMAS TERM,
OF THE
EIGHTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO USUALLY SAT IN BANCO IN THIS TERM, WERE,—
JERVIS, C. J., MAULE, J., WILLIAMS, J., AND CROWDER, J.

1854.

MEMORANDA.

On the first day of this term, Peter Erle, Esq., of the Middle Temple, and Edmund Beckett Denison, Esq., of Lincoln's Inn, who had in the course of the last vacation been appointed Her Majesty's Counsel learned in the Law, took their seats within the Bar.

On the same day, Thomas Phinn, Esq., and Robert Porrett Collier, Esq., both of the Inner Temple, who had respectively received patents of precedence,—the former to take rank next after Peter Erle, Esq., the latter to take rank next after Edmund Beckett Denison, Esq.,—also took their seats within the Bar accordingly.

1854.

Nov. 3.

BLACK v. GREEN.

By the 11th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, the original writ of summons is declared to be in force only "for six months from the day of the date thereof, *including the day of such date;*" but it is enacted, that, if any defendant therein named may not have been served therewith, the writ may be renewed, "at any time *before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ,*" by being sealed with a seal to be provided for that purpose.

Quære, whether the six months for which the renewed writ under this section is to be available, are to be reckoned inclusively or exclusively of the date of the renewal?

The officer, assuming the former to be the proper construction of the statute, having declined to seal a writ which upon that assumption was tendered a day too late,—the Court, without expressing any opinion as to whether or not he had rightly construed the act, directed him to seal the writ *nunc pro tunc*.

AN original writ of summons was issued on the 23rd of August, 1851, and was duly kept in force by renewals in February and August, 1852. The Common Law Procedure Act, 1852,—15 & 16 Vict. c. 76,—came into operation on the 24th of October, 1852. On the 11th of November following, the writ in this action was renewed under the provisions of that act,—ss. 11, 12: and it was again duly renewed on the 5th of May and 3rd of November, 1853, and on the 1st of May, 1854.

On the 1st of November, 1854, the plaintiff's attorney applied at the proper office to renew the writ, according to the provision contained in the 11th section of the Common Law Procedure Act, 1852, which enacts that "no original writ of summons shall be in force for more than *six months from the day of the date thereof, including the day of such date;* but, if any defendant therein named may not have been served therewith, the original or concurrent (s. 9) writ of summons may be renewed at any time *before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ,* by being marked with a seal bearing the date of the day, month, and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said superior courts, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon

delivery to him by the plaintiff or his attorney of a præcipe in such form as has heretofore been required to be delivered upon the obtaining of an alias writ; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons." (a)

The officer refused to seal the writ, conceiving that the six months from the date of the last renewal expired on the 30th of October. Application was thereupon made to Cresswell, J., at Chambers, to direct the officer to affix the seal; but, the point being a new one, his lordship referred the matter to the court.

Willes, accordingly, on the first day of this term,

1854.

BLACK
v.
GREEN.

(a) The 12th section enacts, that, "where any writ of summons in any such action shall have been issued before, and shall be in force at, the commencement of this act, such writ may, at any time before the expiration thereof, be renewed under the provisions of, and in the manner directed by, this act; and, where any writ issued in continuation of a preceding writ, according to the provisions of the 2 W. 4, c. 39, shall be in force and unexpired, or where one month next after the expiration thereof shall not have elapsed at the commencement of this act, such continuing writ may, without being returned non est inventus, or entered of record according to the provisions of the said act of 2 W. 4, c. 39,

be filed in the office of the court within one month next after the expiration of such writ, or within twenty days after the commencement of this act; and the original writ of summons in such action may thereupon, but within the same period of one month next after the expiration of the continuing writ, or within twenty days after the commencement of this act, be renewed under the provisions of, and in the manner directed by, this act; and every such writ shall after such renewal have the same duration and effect for all purposes, and shall, if necessary, be subsequently renewed in the same manner as if it had originally issued under the authority of this act."

1854.

 BLACK
 v.
 GREEN.

moved that the officer might be directed to impose the seal nunc pro tunc. By the 11th section of the 15 & 16 Vict. c. 76, the original writ of summons is declared to be in force only "for six months from the day of the date thereof, including the day of such date;" but it may be renewed, at any time before its expiration, "for six months *from* the date of such renewal," by being marked with a seal bearing date the day, month, and year of such renewal. When the section is dealing with the renewal of the original writ, the six months are declared to be inclusive of the day of the date of the writ; but those words are not repeated in the provision for the renewal of a second or subsequent writ: and the general rule of law for the computation of a period of time, unless the contrary is expressed, is, to reckon it *exclusive* of the first and *inclusive* of the last day. [*Jervis*, C. J. Does it not by the re-sealing become a renewed writ? and, is not its vitality as such limited as before to six months?] That, it is submitted, is not the true effect of the language the legislature has used. [*Jervis*, C. J. I think the whole is overridden by the first provision in the section. *Maule*, J. The original writ is to be in force for six months from its date, including the day of such date,—that is, a writ issued on the 1st of January expires on the 30th of June. The section then goes on, "but, if any defendant named therein may not have been served therewith, the original or concurrent writ of summons may be renewed, at any time *before* its expiration, for six months *from* the date of such renewal, and *so* from time to time during the currency of the renewed writ." Is not the renewed writ to be in force until the last moment of the 30th of December, and no longer?] There is nothing in the section to take it out of the general rule of computation. There are two periods of six months mentioned: one is *expressed* to be inclusive of the day of the date; the

other is not. [*Maule*, J. I should infer that the legislature meant that the two periods should be computed in the same way.] They have not said so: and, at all events the question is open to argument, and the officer of the court should not be permitted, by refusing to stamp the writ, to bar the plaintiff's right for ever. A somewhat similar, though infinitely more hopeless, question arose in *Davies*, dem., *Lowndes*, ten., 7 M. & G. 762, 8 Scott, N. R. 539, where, the demandant in a writ of right having sued out a new writ by "journeys accounts" after the abatement of the original suit by the death of the (*sole*) tenant, the court refused to set aside the writ of grand cape, the return thereto, the count, and subsequent proceedings, though they expressed a strong opinion as to the informality thereof,—seeing that their decision against the demandant would finally determine his right, without any power of appeal. And Lord Lyndhurst, C., had previously,—see 7 Scott N. R. 215,—refused a motion to quash the writ itself; saying, "I strongly incline to think the writ cannot be sustained; and, if it were necessary to decide the question on this motion, I should so determine. But, as the plaintiff would in that case be without remedy, and could not bring the subject under the review of any other tribunal, I think I ought not, having regard to the nature of the question, to interfere in this stage of the proceedings, but leave the defendant to raise the objection on the record in the court in which the suit is now depending." The same reason, it is submitted, will induce the court to accede to this application. [*Jervis*, C. J. In *M'Kellar v. Reddie*, 5 Scott, N. R. 192, a pluries writ of summons issued under the 2 W. 4, c. 39, s. 10, in continuation of a pluries writ, on the 8th of January, 1842, and consequently would expire on the 7th of May; and this court permitted a second pluries issued to continue the preceding writ, and bearing date

1854.

 BLACK
v.
GREEN.

1854. *the 7th of June*, to be entered of record, valeat quantum.
 BLACK
 v.
 GREEN. And the same course was adopted in a subsequent case
 of *Campbell v. Smart*, antè, Vol. V, p. 196.]

Cur. adv. vult.

JERVIS, C. J., now said. We have considered this matter, and have consulted my Brother Cresswell; and we think we could not determine the question without hearing the other side. Under these circumstances, we have come to the conclusion that the better course will be to direct the officers to affix the stamp upon the new writ nunc pro tunc, leaving the plaintiff to the consequences if it should turn out that it was tendered too late.

Order accordingly. (a)

(a) Adopted and acted upon by the court of Queen's Bench in *Anonymous*, 24 Law Journ. N. S., Q. B. 23.

Nov. 20.

BLOOR v. HUSTON.

A. obtained judgment against B. in a county-court, and issued execution. C. claiming the goods, the high-bailiff took out an interpleader summons, and ultimately C.'s claim was disallowed, and C. was ordered to pay the costs of

THIS was a special case stated in pursuance of the provisions of the Common Law Procedure Act, 1852.

The case stated, that whereas James Bloor had sued Wilson Huston, and the said James Bloor affirmed, and the said Wilson Huston denied, that the said Wilson Huston was indebted to the said James Bloor in the sum of 15*l.*, or that he was otherwise legally liable to pay him the same; and it had been ordered by Maule, J., according to the Common Law Procedure Act, 1852, *the interpleader proceedings.* The high-bailiff paid the amount of the levy into court, deducting the fees and expenses incident to the levy, but not the costs of the interpleader, and the balance was paid out of court to A. :—Held, that the high-bailiff could not maintain an action against A. for the interpleader costs.

Whether he could have deducted them from the amount of the levy, under the above order, *quære?*

that the said question between the parties should be decided by the judgment of the court of Common Pleas, upon the following special case stated for the opinion of the court without any pleadings :—

1854.

BLOOR
v.
HUSTON.

The plaintiff, the said James Bloor, is the high-bailiff of the county-court of Staffordshire holden at Newcastle-under-Lyne, which court relatively to the county-court of Lancashire holden at Liverpool, is a foreign court within the meaning of the rules of practice in the county-courts hereinafter referred to.

The defendant Wilson Huston was plaintiff in a suit brought by him against one John Moran in the said county-court of Lancashire holden at Liverpool, and obtained judgment therein against the said John Moran for the sum of 16*l.* 15*s.*, viz. 13*l.* 14*s.* for debt, and 3*l.* 1*s.* for costs, on the 11th of March, 1853.

A writ of fieri facias was issued on this judgment in due form of law, according to the course and practice of the county-courts, on the 17th of December, 1853, to be executed upon the goods and chattels of the said John Moran within the jurisdiction of the said county-court of Staffordshire holden at Newcastle-under-Lyne, being a foreign court as aforesaid, and under which writ the plaintiff was by law authorised to levy the sum of 18*l.* 3*s.* 6*d.*, viz. the said sum of 16*l.* 15*s.*, and also 1*l.* 8*s.* 6*d.* for the costs of writ of fieri facias, and paying money into court, making together the sum of 18*l.* 3*s.* 6*d.*

By virtue of this writ, the plaintiff, as high-bailiff of the said court, on the 19th of December, 1853, seized certain goods and chattels of the said John Moran, which were on the same day claimed by one Mary Collins to be her property. And thereupon proceedings were had and taken by the plaintiff before the judge of the said court in due form of law according to the course and practice of the county-courts, by way of interpleader, to

1854.

 BLOOR
 v.
 HUSTON.

decide upon the said claim; and the said goods and chattels were retained by the now plaintiff in his possession, as high-bailiff as aforesaid, under the said writ fieri facias, and under no other order or authority, until the hearing and adjudication upon the said interpleader proceeding, and sale of the said goods and chattels aftermentioned.

The said interpleader proceeding came on to be heard and was heard, before the judge of the said county court, on the 24th of January, 1854; and thereupon the claim of the said Mary Collins was dismissed, and judgment was given that the said goods and chattels were not the goods and chattels of the said Mary Collins as claimed, and *that the costs of the said interpleader proceeding, amounting to the sum of 25l. 0s. 4d., should forthwith be paid by the said Mary Collins.*

The said sum of 25l. 0s. 4d. for costs was settled by an ex parte taxation, by the proper officer of the said county-court, and was and is made up as follows, viz. 10l. 0s. 4d. for the costs of the now defendant, in respect of the costs of the high-bailiff, and 15l. 0s. 0d. for the high-bailiff's costs.

On the determination of the said interpleader proceeding, the plaintiff, as high-bailiff, in due form of law so and disposed of the said goods and chattels under the said writ of fieri facias, and realised the sum of 22l. 4s. 0d. and, after deducting therefrom the sum of 2l. 7s. 6d., 1d. fees for executing the said writ of fieri facias, and 1d. for five days' possession, due in respect of the first five days' possession of the said goods and chattels, and 1l. 13s. 6d. for the broker's charges in and about the sale of the said goods and chattels, paid the balance, amounting to the sum of 18l. 3s. 6d., to the clerk of the said county court holden at Newcastle-under-Lyne; and the now plaintiff, as such high-bailiff, made out a return in writing of the amount received, and stated in such

turn the gross amount produced by such levy, the particulars of the appraiser's and broker's charges, and the fees allowed for keeping possession as aforesaid : and the clerk of the county-court holden at Newcastle-under-Lyne certified in the said return that 18*l.* 3*s.* 6*d.* was the amount paid into court, and the correctness of the said charges : and the now plaintiff, as such high-bailiff, thereupon transmitted such return to the high-bailiff of the said county-court holden at Liverpool, who delivered the same to the clerk of the said county-court holden at Liverpool, who thereupon paid the sum of 18*l.* 3*s.* 6*d.* to the now defendant.

The rules of practice in the county-courts, established in pursuance of the 12 & 13 Vict. c. 101, have now the force of a statute, and are to be taken to form part of this case, so far as the same are applicable thereto.

The question for the opinion of this court, is, whether the foregoing statement discloses a right of action by the plaintiff against the defendant for 15*l.*

If the court shall be of opinion that it does, then judgment in this action is to be entered for the plaintiff, pursuant to the Common Law Procedure Act, 1852. If not, then judgment is to be entered for the defendant.

Mills, for the plaintiff. It is submitted that the plaintiff in an action in the county-court, who obtains judgment and issues a writ of fieri facias, the execution of which is interrupted by interpleader proceedings which are successfully opposed by him, is responsible to the high-bailiff for the costs of the high-bailiff of and incident to such interpleader proceedings, and that the high-bailiff may recover the same by action against him. The statute of 28 Eliz. c. 4, impliedly gives the sheriff a right to fees ; and he may sue for them. So, here, the 37th section of the county-court act 9 & 10 Vict. c.

1854.

 BLOOR
v.
HUSTON.

1854.

 BLOOR
 v.
 HUSTON.

95 (a), gives the high-bailiff a right to fees; and there is no reason why he should not in like manner have an action for them. [*Maule*, J. This is an interpleader proceeding, at the instance of the high-bailiff.] Yes: and the proceedings are strictly in accordance with the rules framed pursuant to the 12 & 13 Vict. c. 101, which have the same force and effect as if enacted by authority of parliament. [*Williams*, J. The case states that the costs of the interpleader proceeding were ordered to be paid by Mary Collins.] The order would, of course, be drawn up in the usual form. Mary Collins would be bound to pay the costs to the execution-creditor. [*Maule*, J. You rely on the 148th rule?] Yes. [*Maule*, J. That is rather curious. The order is, that the claimant shall pay to the high-bailiff his costs of the interpleader proceeding. The rule says that the costs shall be deducted out of the fund, with which the claimant has nothing to do. (b)] The high-bailiff's costs constitute part of the

(a) Which enacts "that there shall be payable on every proceeding in the courts holden under this act, to the judges, clerks, and high-bailiffs of the several courts, such fees as are set down in the schedule marked (D) to this act annexed, or which shall be set down in any schedule of fees reduced or altered under the power herein-after contained for that purpose, and none other; and the fees on every proceeding shall be paid, in the first instance, by the plaintiff or party on whose behalf such proceeding is to be had, on or before such proceeding, and, in default of payment thereof, shall be enforced, by the order of the

judge, by such ways and means as any debt or damage ordered to be paid by the court can be recovered: and the fees upon executions shall be paid into court at the time of the issue of the warrant of execution, and shall be paid by the clerk of the court to the bailiff, upon the return of the warrant of execution, and not before."

(b) The 148th rule provides, that, "where the claim to any goods or chattels taken in execution, or the proceeds or value thereof, shall be dismissed, the costs of the bailiff shall be retained by him out of the amount levied, unless the judge shall otherwise order."

1854.

 BLOOR
 v.
 HUSTON.

costs of the execution-creditor. The order is in this general form, to save the necessity of two orders as to the costs. [*Maule, J.* There are three parties to an interpleader proceeding,—the execution-creditor, the claimant, and the sheriff or high-bailiff: if the claimant fails to establish his claim, he ought to be made to pay the costs of the high-bailiff (or the sheriff, as the case may be,) and the execution-creditor.] The fact of the high-bailiff being allowed to deduct his costs from the proceeds, shews that he has a claim against the execution-creditor. [*Maule, J.* The 148th rule proceeds upon the assumption that the high-bailiff has succeeded against a wrongful claimant. *Servis, C. J.* The 118th section of the 9 & 10 Vict. c. 95, seems to make it consistent. It enacts, “that, if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof, by any landlord, for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons calling before the said court as well the party issuing such process as the party making such claim; and thereupon any action which shall have been brought in any of Her Majesty’s superior courts of record, or in any local or inferior court, in respect of such claim, shall be stayed, and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the county-court; and the judge of the county-court shall adjudicate upon such

1854.

 BLOOR
 v.
 HUSTON.

claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such court." The high-bailiff would not as a matter of course have costs if no order were made.] The whole proceeding as to costs would be in abeyance, till the order was made. [Maule, J. Suppose it appears that there is collusion between the high-bailiff and the claimant, the high-bailiff may be ordered to pay costs, as the sheriff in an ordinary case of interpleader would be.] The 145th and 146th rules throw some light upon the matter.(a) The statute and the rules

(a) The 145th rule provides, that, where any claim is made to or in respect of any goods or chattels taken in execution under the process of any county-court, or in respect of the proceeds or value thereof, by any landlord, for rent, or by any person not being the party against whom such process has issued, and summonses have been issued on the application of the officer charged with the execution of such process, such summonses may be served in such time and mode as hereinbefore directed for a summons to appear to a plaintiff, and the claimant shall be deemed the plaintiff, and the execution-creditor the defendant; and the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the said officer, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds

of his claim, or, in case of a claim for rent, of the amount thereof, and for what period, and in respect of what premises, the same is claimed to be due, and the name and description and address of the claimant shall be fully set forth in such particular, and any money paid into court under the execution shall be retained by the clerk until the claim shall have been adjudicated upon: Provided, that, by consent, an interpleader claim may be tried, although the above rule has not been complied with."

The 146th rule provides that "interpleader summonses may be issued by the clerk, on the application of the bailiff, without leave of the court."

And the 147th rule provides that "interpleader summonses shall be issued from the court of the district in which the levy was made, and the execution-creditor and claimant may be summoned to such court, without leave of such court."

draw a manifest distinction between the ordinary costs of the suit, and costs of interpleader proceedings. Where costs are ordered to be paid by one party to the other, the high-bailiff's fees form part of the costs which are so ordered to be paid. The execution-creditor and the claimant are the only persons before the court, as between whom costs could be ordered. The 33rd section provides that "the high-bailiffs shall be entitled to receive all fees and sums of money allowed by this act in the name of fees payable to the bailiff;" and s. 37 regulates the amount of the fees to be taken, and directs that a table shall be put up in some conspicuous place in the court-house and in the clerk's office: and s. 117 imposes penalties upon the officers for wilfully and corruptly exacting fees other than those allowed. [*Maule, J.* The costs in question are not "fees" at all. No doubt, the county-court judge had power to order the high-bailiff's costs to be paid: he *has* ordered them to be paid, not by the plaintiff in the suit, but by Mary Collins, the claimant.] The 139th rule gives authority to deduct the appraiser's and broker's costs.(a) The interpleader

1854.

 BLOOR
v.
HUSTON.

(a) "Where, by virtue of any process issued into a foreign district, any money shall have been received by the bailiff of the foreign court, such bailiff shall, within twenty-four hours from the receiving of such money pay over the same to the clerk of the foreign court, and shall make a return in writing of the amount received; and, in the case of a levy having been made, the bailiff shall state in the return the gross amount produced by such levy, the particulars of the appraiser's and broker's charges, and the fees allowed for keep-

ing possession, and pay over to the clerk of the foreign court the amount levied, less such charges and fees, and the clerk of the foreign court shall certify in the said return the amount paid into court, and the correctness of the said charges, and in all the above cases shall account for and pay over such amount to the treasurer of his court, at the time of making his monthly return of fees to such treasurer, or at such time as the treasurer shall require; and the high-bailiff shall thereupon transmit such return to the high-bailiff of the home

1854.

 BLOOR
 v.
 HUSTON.

proceedings being for the benefit of the defendant, the costs ought to be borne by him. [*Williams, J.* I do not perceive that any duty in respect of these costs is thrown upon the present defendant.]

Mellish, for the defendant. This case presents two questions for the determination of the court,—first, whether the defendant is liable for these costs at all,—secondly, if liable at all, whether the high-bailiff has a remedy *by action*. Interpleader proceedings in the county-court are regulated by the 118th section of the 9 & 10 Vict. c. 95, the interpretation of which presents no difficulty. The judge is to adjudicate upon the claim, and to make such order between the parties in respect thereof, *and of the costs of the proceedings*, as to him shall seem fit: and such order is to be enforced in like manner as any order made in any suit brought in the county-court. The judge may order that the costs be paid by the claimant or by the execution-creditor, or he may decline to order the costs of the high-bailiff to be paid at all. The high-bailiff can have no costs, unless ordered by the judge: and, if costs are ordered, they can only be enforced under the order; no action is maintainable for them. Reliance is placed, on the other side, upon the 148th rule. But, how can that rule give the high-bailiff a right of action against the plaintiff? The

court, as directed by the 104th section of the 9 & 10 Vict. c. 95, and such latter bailiff shall, within twenty-four hours from the receipt of such return, deliver the same to the clerk of his court, who shall thereupon pay out of any money in his hands, to the plaintiff in the cause, the amount certified in such return to have been re-

ceived by the clerk of the foreign court as the proceeds of the execution, and shall enter in a book the amount so certified, in the form given in the schedule; and the clerk of the home court shall file such return, and the clerk shall be allowed by the treasurer of his court, at his audit, the amount so paid."

authority given to the judges by the 12 & 13 Vict. c. 101, s. 12, is, "to frame such general rules and orders as to them shall seem expedient for and concerning the practice and proceedings of the courts holden under the 9 & 10 Vict. c. 95, and for the execution of the process of such courts, and in relation to any of the provisions of the said act as to which there may have arisen doubts or have been conflicting decisions in the said courts." Suppose the 148th rule had in terms provided that the high-bailiff might recover these costs by an action in the court of Common Pleas: the answer obviously would be, that the judges had no authority to make such a rule. [He was stopped by the court.]

1854.

 BLOOR
 v.
 HUSTON.

JERVIS, C. J. Assuming for the sake of argument,—without offering any opinion upon it,—that the high-bailiff might have been entitled under the circumstances to deduct the 15*l.* costs, provided he had made his claim at the proper time, I am of opinion, that, having paid to the clerk of the Newcastle county-court the whole amount of the levy after deducting only his fees for executing the fieri facias, the possession money, and the broker's charges in respect of the sale of the goods, and having allowed it to be transmitted to the clerk of the Liverpool county-court, and by him paid over to the execution-creditor, he has no right to bring an action against him for the expenses of the interpleader proceedings. Mr. Mills says that these are fees due to the high-bailiff by virtue of the statute, and therefore an action will lie for them. It is a mistake, however, to call these "fees:" they are expenses incurred by the high-bailiff in the prosecution of the interpleader proceedings. On that simple ground, therefore, viz. that there is no duty cast upon the execution-creditor to pay the amount of these expenses, independently of the order

1854. of the judge, I am of opinion that the plaintiff is not entitled to recover.

BLOOR
v.
HUSTON.

MAULE, J. I am of the same opinion. The facts here stated do not present anything like a case for money had and received. The right which the high-bailiff at the most had, was, to deduct the costs of the interpleader proceeding from the amount of the levy, under the judge's order. Instead, however, of doing that, he pays the money into court, and allows it to be handed over to the execution-creditor, the now defendant. That being the state of things, I do not see how the present plaintiff can claim the amount as money had and received to his use. It cannot be said that there was any implied undertaking on the part of the now defendant to pay the costs in question, or any equity entitling the now plaintiff to claim them from him. As well might he distrain for it as rent, as call it fees: it is no more recoverable as fees than it is recoverable as rent, or interest of money. The present action seems to me to be a desperate shift by some chance to obtain from the defendant payment of money which, if ever the plaintiff was entitled to recover it, he has allowed the opportunity to go by. I think the defendant is clearly entitled to judgment.

WILLIAMS, J. I am of the same opinion. Certainly, the construction of the county-court rule No. 148, as applied to the 118th section of the 9 & 10 Vict. c. 95, is somewhat obscure. It may be, as Mr. Mills suggests, that, in order to save the necessity of two orders as to costs, it may have been intended that there should be one order only, in general terms, and that the bailiff shall have his costs of the interpleader by way of retainer out of the sum levied. But not having done so, the question is, whether he can recover the amount by action.

If this were meant to be an action for money had and received, all the circumstances relied on to shew that the money in question was money had and received by the defendant to the use of the plaintiff, should have been stated. It is not stated whether the plaintiff paid the money over under a mistake of fact or of law. I cannot, therefore, say that an action will lie. To say that the costs in question are "fees" within the meaning of the statute, is altogether a mistake.

1854.

BLOOR
v.
HUSTON.

CROWDER, J. The only question upon this case, is, whether the facts disclose a right of action by the plaintiff against the defendant. I think they do not. It is unnecessary to decide how far the rule referred to is applicable to such a state of things as existed here. But, assuming that the high-bailiff might have retained these costs out of the money levied, he has not exercised that power. He has paid the money into court, and allowed it to be paid out to the plaintiff in the suit in the county-court. If he is now entitled to claim to be repaid, possibly he may have a remedy by applying to the judge of the county-court. But it does not follow that he has any right of action. It appears to me that he has no such right. The defendant, therefore, must have judgment.

Judgment for the defendant.

1854.

Nov. 9.

A landlord, having distrained for rent, was induced to withdraw the distress, by the tenant's assurance (which was false) that a particular debt had been satisfied. The creditor having proceeded to judgment and execution, the tenant's goods were seized by the sheriff:—Held, that the landlord was entitled to a year's rent, under the statute 8 Anne, c. 14.

WOLLASTON, Appellant; STAFFORD, Respondent.

THIS was an appeal from a decision of the judge of the Leicestershire county-court. The following case was stated by the judge:—

The plaintiff (the respondent), apprehending proceedings against his tenant (who was also his brother-in-law) on the part of a creditor named Millican, entered a distress for upwards of a year's arrears of rent, but was induced to withdraw it, on the tenant's assurance that Millican's debt was settled, and payment of the costs.

Within a month, Millican, having obtained judgment, proceeded to execution.

The plaintiff gave notice to the sheriff to retain 25*l.*, for a year's rent; but the sheriff (the defendant), who was indemnified, refused to do so, on the ground that the landlord, in withdrawing the distress, had lost his right,—which was the question in the case.

T. Bell, for the appellant. [*Jervis*, C. J. The county-court judge has no right to save points for us: he should decide for himself; the statute 13 & 14 Vict. c. 61, s. 12, giving the right only to appeal "from some decision or determination in point of law." *Phipson* (who appeared for the respondent). The judge, in point of fact did decide in favour of the plaintiff. *Maule*, J. Let us hear the objection to that. The case may be considered as amended.] The right of distress was under the circumstances gone, by the plaintiff's voluntarily abandoning the distress: and, inasmuch as he could not legally have entered to make another distress, the plaintiff ceased to be entitled to the protection of

the statute 8 Anne, c. 14, s. 1. In *Bagge*, App., *Mowby*, Resp., 8 Exch. 641, half a year's rent being due and in arrear from a tenant who had previously committed an act of bankruptcy, the landlord put in a distress, and was about to proceed with the sale of the goods seized, when, in consequence of a notice from a creditor of the tenant, stating that he was taking proceedings in bankruptcy against the tenant, and that he thereby warned the landlord not to sell, and threatened to hold him accountable if he did, the landlord withdrew the distress without obtaining payment of his rent. At that time, no assignee had been appointed; but the tenant was afterwards declared bankrupt, and the creditor who gave the above notice was made assignee. The landlord subsequently distrained a second time for the same rent, but the goods were sold under the direction of the assignee, and the proceeds of the sale were paid over to him. It was held, that, as the landlord had abandoned the first distress without any sufficient excuse for so doing, the second distress was illegal, and that he could not maintain an action against the assignee to recover the proceeds of the goods. Parke, B., in delivering judgment, said: "There is nothing more clear than this, that a person cannot distrain twice for the same rent; for, if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course, as, for example, in the instance put by Lord Mansfield, C. J., in *Hutchins v. Chambers*, 1 Burr. 579. If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or, if the tenant has done anything equivalent to saying 'forbear to distrain now, and postpone your distress to some

1854.

WOLLASTON
App.
STAFFORD,
Resp.

1854.

WOLLASTON,
App.,
STAFFORD,
Resp.

other time,' in such cases, the landlord may distrain a second time. But, if there is a fair opportunity, and there is no lawful or legal excuse why he should not work out the payment of the rent by means of the first distress, his duty is to work it out by the first distress, and he cannot distrain again. The question, therefore, in this case comes simply to this, whether the notice that was given by the respondent (who was merely the petitioning-creditor, and had no other interest whatever in the property) to the landlord, to desist from selling on the first distress, was a good cause or excuse for his abstaining from exercising the power of distress. We are all of opinion that it was not, and that it was a mere idle threat, which he might and indeed ought to have disregarded. It cannot be said that the first distress was abandoned by the act of the tenant, for, at the time the respondent gave the notice, he had no interest whatever in the subject-matter, since at that time he had not been appointed assignee. We consider the notice as a mere idle threat from a stranger, who had no right to interfere with the distress, and that the landlord ought to have proceeded with that distress." The only distinction between that case and the present, is, that there the abandonment of the first distress was voluntary, upon a statement made by *a stranger*. [*Jervis*, C. J. The case states that the respondent was induced to withdraw the distress, on the tenant's assurance that Millican's debt was settled. What do you understand by "induce?" "To induce," means, "to introduce," "to bring into view," according to Johnson. [*Jervis*, C. J. That cannot be the meaning here; for, the tenant kept the facts out of view, and falsely told the landlord that Millican's debt was settled. It means rather "to influence," "to persuade."] To make the second distress lawful, it should appear that the first was withdrawn at the request of the tenant. [*Maule*, J. Of that there is

no doubt. And I think it is equally clear that the distress here *was* withdrawn at the tenant's request.]

1854.

WOLLASTON,
App.,
STAFFORD,
Resp.

Phipson, contra, was not called upon. (a)

JERVIS, C. J. I agree with my Brother Maule that the statement of the case leaves it free from doubt that the first distress was withdrawn by the landlord at the request of the tenant, and therefore the county-court judge properly decided in favour of the plaintiff. The judgment must, therefore, be affirmed, with costs.

The rest of the court concurring,

Judgment affirmed, with costs.

(a) The points intended for argument on the part of the respondent, were,—

That, by the 8 Anne, c. 14, s. 1, the sheriff was bound to pay the landlord all such money as was *due* for rent at the time of the seizure under the execution, not exceeding one year:

That, as the respondent was induced to withdraw the distress upon the tenant's assurance that Millican's debt and costs had been paid, and by necessary inference (upon the facts stated in this case), at the request of the tenant, in kindness to him, and not vexatiously, the withdrawal of the distress did not deprive the respondent of his right to have paid him a year's rent by the sheriff:

That the rent for which the distress was entered was not,

under the circumstances, satisfied by such entry and the subsequent withdrawal, and consequently the rent was still *due* at the time the sheriff seized, and, being due, the respondent was entitled to claim it under the statute:

That the conduct of the tenant was a fraud on the respondent, and the respondent being entirely induced by such fraud to withdraw the distress, he could not be prejudiced by such withdrawal so induced, and he was entitled to claim the year's rent:

And that a mere seizure under a distress, and subsequent abandonment without sale, was no satisfaction of rent, and therefore the rent was still due at the time of the taking by the sheriff, and the respondent was entitled to a year's rent.

1854.

Nov. 6.

LEVERSON v. SHAW.

The 15 & 16 Vict. c. 54, s. 1, provides that a scale of costs and charges to be paid to attorneys in the county-courts, shall be prepared, and submitted for the approval of certain of the judges, and that,

"from and after a day to be named by such judges," the scale so allowed shall be in force in every county-court. The act then goes on to provide, that "all costs shall be taxed by the clerk of the court;" and that "no attorney shall have a right to recover at law from his client any costs or charges not so allowed on taxation."

Business was done by an attorney in a county-court, and an action brought in respect thereof, before the allowance of any scale of costs under the above act:—Held,

that he was not precluded from recovering his costs.

THIS was an action upon an attorney's bill. Plea never indebted.

At the trial, before Jervis, C. J., at the sittings at Guildhall after the last term, it appeared that the plaintiff claimed 24*l.*, 5*s.* of which was for costs incurred in conducting a suit in a county-court, in which the now defendant had recovered a sum of 3*l.* 18*s.* A verdict having been found for the plaintiff for the amount claimed,

Lush, in pursuance of leave reserved, now moved to reduce the verdict to 19*l.*, on the ground that the costs incurred in the county-court were not recoverable unless taxed and allowed by the clerk of the court, pursuant to the statute 15 & 16 Vict. c. 54, s. 1. [*Jervis*, C. J. It is hardly worth while to move; for, I find I have made a note,—“I shall certify, if necessary.”] It was decided in this court, in a case of *Ex parte Keighley*, antè, Vol. IX, p. 338, 1 L. M. & P. 304,—overruling a case of *In re Clipperton*, 12 Q. B. 687,—that the 91st section of the county-court act, 9 & 10 Vict. c. 95, did not preclude an attorney from recovering from his client a reasonable remuneration for his work and labour done *out of court*, before the institution of a suit, or take away the right of the superior courts to allow on taxation a reasonable remuneration for this description of labour. And that construction was adopted by the court of Queen's Bench, in a subsequent case of *In re Toby*, 12 Q. B. 694, 1 L. M. & P. 426. But now, by the 15 & 16 Vict. c. 54, s. 1, it is enacted "that it shall be lawful for

the Lord Chancellor from time to time to appoint five of the judges of the courts holden under an act of the 9 & 10 Vict. c. 95, from time to time to frame a scale of costs and charges to be paid to attorneys in the county-courts, *to be allowed as between attorney and client* and as between party and party; and such scale of costs and charges as shall be certified to the Lord Chancellor under the hands of the judges so appointed or authorised, or any three of them, shall be submitted by the Lord Chancellor to three or more of the judges of the superior courts of common law at Westminster, of whom the Chief Justice of the court of Queen's Bench or Common Pleas, or the Chief Baron of the Exchequer, shall be one, and such judges of the superior courts may approve or disallow or alter or amend such scale of costs and charges, and the scale of costs and charges so approved, altered, or amended shall, from and after a day to be named by such last-mentioned judges, be in force in every county-court; *and all costs between party and party and attorney and client shall be taxed by the clerk of the court*; but his taxation may be reviewed by the judge upon the application of either party; and in no case, upon the taxation of the costs between attorney and client, shall any charges be allowed, not sanctioned by the aforesaid scale, unless the clerk is satisfied by writing under the hand of the client that he has agreed to pay such further charges, *and no attorney shall have a right to recover at law from his client any costs or charges not so allowed on taxation*; and the judges of the county-courts so appointed shall possess the same powers of making rules for regulating the practice of the courts, and of settling doubts on the construction of any acts relating to county-courts, as were conferred on the judges to be appointed by the Lord Chancellor for that purpose by the 12 & 13 Vict. c. 101, unless otherwise specially provided." [Jervis, C. J. No such scale of

1854.

LEVERSON

v.

SHAW.

1854.

 LEVERSON
 v.
 SHAW.

costs and charges has yet been allowed. The consequence, as you contend, is, that no costs at all can be recovered! The words of the act are absolute and qualified,—“All costs between party and party and attorney and client shall be taxed by the clerk of court; and no attorney shall have a right to recover at law from his client any costs or charges not so allowed on taxation.” Until a scale is made and allowed, attorney has no means of getting his costs.

MAULE, J. Before the passing of the 15 & 16 Vic 54, the clerk of the county-court had no jurisdiction to tax costs. The act passes, providing that a scale of costs and charges shall be prepared, and submitted for the approval of certain of the judges, and that, “from and after a day to be named by such last-mentioned judges the scale so allowed shall be in force in every county-court. The act then goes on to provide, that “all costs between party and party and attorney and client shall be taxed by the clerk of the court,” and that “no attorney shall have a right to recover at law from his client any costs or charges not so allowed on taxation.” The act does not in terms take away any jurisdiction to which previously belonged to the superior courts, but merely confers upon the clerk of the county-court the authority to tax bills for business in his court, when a scale shall have been settled and allowed. As the law stood before, there was an appropriate tribunal for the taxation of bills for business done in the county-court. When the new taxing power comes into existence, the old jurisdiction will cease: but, until then, it remains untouched. The words “from and after a day to be named,” override the whole.

The rest of the court concurring,

Rule refused.

1854.

WEGENER v. SMITH.

Nov. 6.

THIS was an action by the master of a ship called the *Gustave Adolphe*, against the defendant, a merchant at Sunderland, for demurrage. Plea, amongst others, never indebted.

The cause was tried before Crowder, J., at the last Assizes at Durham. The plaintiff put in a charterparty between one Schreber, a merchant at Stettin, and himself, for the hire of the ship for a voyage to Sunderland with a full cargo of timber. The charterparty provided that the cargo should be brought alongside and put free on board, to be delivered at the port of discharge on payment of a certain measurement freight; and, in case of detention, the captain to be paid 5*l.* for every proveable lay-day.

The bill of lading, for the whole cargo, which was indorsed to the defendant, made the goods deliverable to order "against payment of the agreed freight and other conditions as per charterparty."

The defendant received the timber under the bill of lading, but refused to pay the demurrage claimed by the plaintiff, alleging that he was not liable for demurrage; and it was insisted, on his behalf, at the trial, that the action was not maintainable, that the master could not sue, and that the defendant as assignee of the bill of lading was not liable for demurrage, in the absence of a contract on his part, express or implied, to pay it, and that there was no evidence to go to the jury of any such implied contract.

On the other hand, it was insisted, that the reference to the charterparty in the bill of lading incorporated

The acceptance of a cargo by the indorsee of the bill of lading whereby the goods were deliverable to order "against payment of the agreed freight and other conditions as per charterparty," is a circumstance from which the jury may imply a contract on his part to pay demurrage stipulated for by the charterparty, notwithstanding his refusal at the time of receiving the goods to pay the demurrage.

1854.

 LEVERSON
 v.
 SHAW.

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1854.

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1854. therein all its terms, and amongst others the contract
for demurrage.

WEGENER
v.
SMITH.

The learned judge, reserving the points, left the case to the jury, who returned a verdict for the plaintiff, damages 60/.

Watson now moved for a rule calling upon the plaintiff to shew cause why the verdict should not be entered for the defendant, or why there should not be a new trial, on the ground of misdirection, and that the verdict was against evidence, and also on the ground that the damages were excessive. The indorsee of a bill of lading receiving a cargo under it, it is a matter of fact whether he has or has not undertaken to pay demurrage, in the absence of an express stipulation for demurrage in the instrument itself. In *Brouncker v. Scott*, 4 Taunt. 1, it was held that the master of a ship cannot maintain assumpsit in his own name upon an implied promise to pay demurrage. Sir J. Mansfield there says: "This is certainly an action *primæ impressionis*, and is an experiment which it is not suggested has been attempted before. It is a claim made by the captain of a ship upon a subject-matter in which he has no interest; and it is true, that, even if he had been the contracting party, that contract would have been deemed to have been made by him for the benefit and on the behalf of his principal. Such being the case, I cannot see that necessity requires this action to be supported; and, if not, its very novelty is a sufficient objection to it. How long ago it is since an action brought by a captain of a ship for freight was first entertained, I do not know; but it is observable, with reference to that species of action, that the bill of lading usually specifies 'that the captain is to deliver the goods on payment of the freight,' and, if he delivers them without such payment, he becomes liable to his owner for so doing; it has been held, there-

fore, that he may maintain an action against the consignee, upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands before payment. But this form of action for demurrage, without a special contract to that effect, is not of long standing, even in the case where the owners of ships are the plaintiffs; and, as it generates a question whether the time elapsed was a reasonable time, and also what is a reasonable compensation for the use of the ship, it would be much better if it had not been encouraged, and if the owner had always made it a subject of special contract: but, however that action may be supportable, I think it clear this cannot." [Maule, J. No doubt, if the bill of lading had expressed that the goods were to be delivered on payment of demurrage, as well as freight, as per charterparty, the indorsee of the bill of lading receiving the goods must pay the demurrage. That reduces two of your points to one. If demurrage is comprehended in the bill of lading, the master may sue; if not, he cannot. The question therefore turns upon the construction of the bill of lading, coupled with the fact that the subject of the bill of lading, as well as of the charterparty, is, the whole cargo.] *Sanders v. Vanzeller*, 4 Q. B. 260, 3 Gale & D. 580, shews that it is in all cases a question of fact whether the indorsee agrees to pay demurrage or not. That was indebitatus assumpsit for freight and primage for goods carried on board the plaintiff's ship at the defendant's request, for work and labour, and for the use of the plaintiff's ship kept on demurrage at the defendant's request. It was found by a special verdict, that, by charterparty between B. and the plaintiffs, being owners of a vessel, it was agreed that the vessel should proceed to Ibrail, and there load from B.'s agents a cargo, and proceed therewith to London, and deliver the same on being paid freight at a

1854.

WEGENER
v.
SMITH.

1854.

WEGENER

v.

SMITH.

rate specified, half in cash, and half by bills at three months, a certain rate being also specified for demurrage. The vessel arrived at Ibrail, and shipped goods from B.'s agent. By the bills of lading, the goods were to be delivered to B. or his assigns, he or they paying freight as per charterparty, and primage. Before the ship arrived in London, B. sold part of the goods to the defendant, and indorsed to him the corresponding bills of lading. When the ship arrived in London, the goods sold were, by the defendant's order, entered in his name at the Custom-House and the docks, the defendant paying the duties: and the defendant obtained possession of the goods under the bill of lading and indorsement. The jury referred it to the court, whether the defendant did or did not promise as alleged in the declaration. It was held by the Exchequer Chamber,—affirming the judgment of the court of Queen's Bench,—that, whether or not the facts found were evidence of a contract by the defendant with the plaintiff to pay freight for the goods sold (as to which, *quære*), no such contract was implied by law from the facts; that the court could not assume such a contract on this finding; and that the defendant was entitled to judgment; and, further, that, if the bills of lading had not referred to the charterparty, but had merely stated that the goods were to be delivered to the consignee or his assigns, on their paying freight, the taking the goods under the indorsement would have been evidence from which a jury might have inferred a contract between the defendant and the plaintiffs to pay freight; but that, even in such a case, no such contract could arise by mere implication of law. Here, so far from acquiescing in the demand for demurrage, the defendant always repudiated his liability. [*Jervis*, C. J. His saying he will not pay demurrage amounts to nothing, if he receives the goods under the bill of lading. The master gives up his lien.] The master has

no lien for demurrage. [*Jervis*, C. J. Yes he has, if it is covered by the bill of lading.] Until the whole cargo is delivered, the demurrage cannot be ascertained. [*Maule*, J. No matter whether there is a lien or a quasi lien for it or not: the defendant is liable for demurrage, if the bill of lading makes it part of the contract. The fact of his receiving the goods, to which he is only entitled under a bill of lading making them deliverable to him on payment of freight and demurrage, renders him liable to pay demurrage. That is putting it at the lowest. Here was evidence for the jury that the defendant contracted to pay demurrage. His repudiation of liability amounts to nothing.]

1854.

WEGENER
v.
SMITH.

JERVIS, C. J. As far as regards the evidence, the whole was a question for the jury: they found for the plaintiff; and I do not understand my Brother Crowder to express himself dissatisfied with the verdict. The only question is as to the construction of the words in the bill of lading, "against payment of the agreed freight and other conditions as per charterparty." That refers to the charterparty, which stipulates for demurrage at 5*l.* per day. I think the defendant was clearly liable to demurrage.

MAULE, J. I also think there was abundant evidence to justify the jury in finding as they did. As the defendant received the goods under the bill of lading, the demurrage was clearly a matter of just charge against him. With respect to the construction of the bill of lading, I have already sufficiently expressed my opinion, and need not repeat it.

WILLIAMS, J. I also think there should be no rule in this case. The whole matter was left to the jury

1854. strictly in conformity with the doctrine in *Sanders v. Vanzeller*.

WEGENER
v.
SMITH.

CROWDER, J. I retain the opinion I formed at the trial. It was peculiarly a question for the jury.

Rule refused.

Nov. 25.

HUNTER v. EMMANUEL.

Upon a trial by the record, the court amended the declaration by inserting therein *the true amount* recovered by the judgment, under the 15 & 16 Vict. c. 76, s. 222.

THE declaration in an action upon a judgment recovered in this court, stated the plaintiff to have recovered against the defendant 118*l*.

Upon an issue on noli record, the record being produced, it appeared that the sum recovered by the judgment declared on was 117*l*. only.

Quain, on moving for judgment, also prayed leave to amend the declaration, by inserting therein the correct amount. He referred to the Common Law Procedure Act, 15 & 16 Vict. c. 76, and to the case of *Noble v. Chapman*, antè, Vol. XIV, p. 400, where a similar amendment was allowed as to the *date* of the judgment.

Per Curiam. Let the record be amended, and the plaintiff have judgment.

Rule accordingly.

1854.

GOATLEY v. EMMOTT.

Nov. 14.

MASSEY DAWSON moved to set aside so much of an order of Crowder, J., as required the plaintiff to give security for costs, on the ground that the plaintiff was insolvent, and had assigned the debt which was the subject of the action, to one Wickers. [*Williams, J.* Is the action said to have been brought for the benefit of Wickers?] It is so suggested. But neither of the grounds assigned, it is submitted, is sufficient to call upon the plaintiff to give security. It was undoubtedly held by the court of Exchequer, in a case of *Perkins v. Adcock*, 14 M. & W. 808, 3 D. & L. 270, that, where a plaintiff is bankrupt or insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs. But there are several cases opposed to it. Thus, in *Anonymous*, 2 Taunt. 61, this court refused to compel security for costs, on the ground that the plaintiff was a bankrupt, or in Newgate. So, in *Snow v. Townsend*, 6 Taunt. 123, 1 Marsh. 477, it was held, that the court will not prevent one who has assigned his property under an insolvent act from suing for a debt due to him before his assignment, the assignee refusing to sue; nor will the court compel him to give security for costs. Again, in *Morgan v. Evans*, 7 J. B. Moore, 344, the court refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of a third person, who was alone beneficially interested in the result. There is another class of authorities, to which the attention of the courts does not seem to have been invited in any of these cases. It

Where a plaintiff is insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs.

1854.

GOATLEY

v.

EMMOTT.

sometimes happens that the assignor is unwilling to allow an action to be brought in his name for the recovery of the debt; but the courts have held that the assignee has an absolute right to use the name of the assignor. (a) To require security in such a case, might be requiring the assignee to do what was impossible, and so he might be deprived of the benefit of the assignment. [*Jervis*, C. J. Where a party acquires a right to sue, by reason of the insolvency of the nominal plaintiff, I see no hardship in calling upon him to give security for costs. It is, after all, a mere matter of practice: the justice of the matter is against you.] The case of *Perkins v. Adcock* is the only authority which at all presses.

JERVIS, C. J. The habit of this court is, to adhere to the authority of decided cases; for, it is essential that the practice should be consistent and uniform. The case of *Perkins v. Adcock*, which we are called upon to overrule, has for several years been acted upon: and I, for one, am not disposed to disturb it.

CROWDER, J. *Perkins v. Adcock* is cited in the 8th edition of Archbold's Practice, p. 1233, and I believe has never been doubted until this moment.

The rest of the court concurring,

Rule refused.

(a) See *Pickford v. Ewington*, 4 Dowl. P. C. 453.

1854.

HOLMES v. SERVICE.

Nov. 24.

LUSH moved for leave to proceed as if personal service of the defendant with the writ of summons had been effected, pursuant to the 17th section of the Common Law Procedure Act, 1852,—15 & 16 Vict. c. 76,—which enacts that “the service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ *has come to the knowledge of the defendant*, or that *he wilfully evades service* of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit.

Where the defendant is a lunatic, the court has no power, under the 15 & 16 Vict. c. 76, s. 17, to allow the plaintiff to proceed as if personal service of the writ of summons had been effected, unless it can be made to appear that the writ has come to the defendant's knowledge, or that he wilfully evades service.

The affidavit upon which the motion was founded, stated various attempts to serve the defendant at his dwelling-house, but that the deponent was unable to see him, his family representing him to be ill and under the care of a keeper, and refusing access to his room or to convey the process to him: the affidavit then went on to state, that one of the defendant's sons, being at length prevailed upon to go up stairs to speak to the defendant on the subject, returned saying “he could not make head or tail of him,” and that he was quite mad; that the deponent called upon one Drage, a medical man who was attending the defendant, for the purpose of satisfying himself of the truth of the son's statement; and that Drage informed the deponent that the defendant was quite mad and incapable of

1854.

HOLMES
v.
SERVICE.

attending to business, and dangerous to any stranger and that in fact he (Drage) would not like to see him upon anything of an irritating nature. *Lush* submit that this was ample evidence that the service of the process was evaded. [*Williams, J.* Your affidavit shews that the defendant is of unsound mind. Does it shew that the process came to his *knowledge*, or that *he evaded service*?] It is submitted that it does sufficiently shew both. [*Jervis, C. J.* I see no evidence whatever that the writ has come to the knowledge of the defendant. *Crowder, J.* There is no evidence either that he understood the matter or evaded service of the writ. *Patterson*, amicus curiæ, referred to a case of *Ridgway Cannon*, 23 *Law Times*, 143, where the court of Queen's Bench held that the statute gave them no authority to act in such a case, but suggested, as a means of extracting the plaintiff from the difficulty, that the keeper should be informed that it was his duty to allow the writ to be served on the defendant, or else application might be made for a habeas corpus for the purpose of bringing up the lunatic, so that service might be effected. (a)] Before the passing of this act, the plaintiff had a remedy in such a case as this, by distress. (b) The object of the present enactment was, to render the service of process more easy: and the court will, if possible, so construe the words as to effectuate the intention of the legislature.

JERVIS, C. J. This is probably, as the court of Queen's Bench seem to have thought in *Ridgway v. Cannon*, an omission in the act: but we cannot help the plaintiff.

The rest of the court concurring,

Rule refused.

(a) In that case, the defendant was confined in a private lunatic asylum. But see *In re Child*, antè, p. 238.
(b) See *Blake v. Cooper*, antè, Vol. XI, p. 680.

1854.

DEACON v. GRIDLEY.

Nov. 9.

THE first count of the declaration stated, that, before and at the time of the making of the contract in that count mentioned, the plaintiff was the holder of and entitled to fifty certificates of fifty York and Newcastle preference shares, and also one hundred certificates of one hundred shares in an undertaking called The Demerara Railway Company, which several shares and certificates were contained in certain paper writings; and thereupon the plaintiff, at the request of the defendant, lent to him the said certificates, to be returned

The plaintiff declared, in the first count, in debt for railway shares; in the third, in trover for certificates for shares; in the fourth, in detinue for the certificates for shares mentioned in the third count.

The fifth count stated, that, at the

time of the writing the letter and making the contract therein and in that count mentioned, the claims of the plaintiff in the first, third, and fourth counts had severally arisen and accrued in manner and form as therein expressed, and the defendant ought to have paid or satisfied the plaintiff for and in respect of those several claims; that the defendant had from time to time requested the plaintiff to give him time, and to forbear and grant to him indulgence for the payment or satisfaction of the said claims, which the plaintiff had done; and that the defendant, being insolvent and unable to pay or satisfy those claims, and to obtain further time, wrote to the plaintiff, as follows:—"That I have wronged you in not having (because incapable) repaid or returned that which you lent me (thereby meaning and referring, amongst other loans, to the said loan of the said certificates in the first count mentioned), it were useless for me to deny: but, how I have wronged you in feeling, seeing that I have ever, as I do now, entertained for you the sincerest gratitude and regard, I know not, beset as I am in difficulties on every side, not resulting from extravagance, but from bad fortune. I know how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence (thereby meaning that the defendant did then entreat and ask for indulgence from the plaintiff for the payment or satisfaction of the claims of the plaintiff). Yet will I say that the most anxious endeavour and hope of every future day shall be, to prove my regard and gratitude in the only way in which the world esteems the proof, by restoring to you all that I owe (thereby meaning, amongst other things, the payment or satisfaction of the said claims of the plaintiff)." The count concluded with an averment, that, in pursuance of that letter, and on the faith of the promise of the defendant therein contained, the plaintiff, at the request of the defendant, did continue to give him time, and to forbear and grant him indulgence and further time for the payment or satisfaction of the said claims; but that, although a reasonable time had elapsed for the performance by the defendant of his said contract in the said letter contained, yet the defendant had not restored to the plaintiff all he owed, but had neglected and refused so to do, &c. :-

Held, on demurrer to the fifth count, that the letter shewed no request for forbearance, nor any consideration for a fresh promise by the defendant to pay what he already was liable to pay; and that, if it did amount to a fresh promise to pay, it was a promise without consideration.

1854.

DEACON
v.
GRIDLEY.

by the defendant to the plaintiff on request; yet the defendant, although he was afterwards requested by the plaintiff to return to the plaintiff the said one hundred certificates of the said one hundred shares in the said Demerara Railway Company according to his contract, neglected and refused so to do, and also kept and detained the same from the plaintiff for a long and unreasonable time, contrary to the said contract of the defendant: and that thereby, and by reason of such wrongful neglect and refusal, and such wrongful keeping and detaining of the same, the plaintiff could not sell or dispose thereof as he otherwise might and would have done, and could not transfer the same according to the regulations of the said Demerara Railway Company, and by means of the premises not only lost the value of the last-mentioned certificates, and of the deposit of money which had according to those regulations been before then paid for and in respect of them, but was obliged, under and by virtue of those regulations, to pay divers calls of money from time to time made for and in respect of those certificates and shares, and had lost the value of those calls; and, the same certificates and shares having become of little value, and unsaleable, the plaintiff had by reason of the premises, and the wrongful default of the defendant, been deprived of all the benefit of the sale thereof when the same might have been sold, and had further incurred the burden and loss of the payment of the said calls, and had also lost the interest of the money which he had so been necessarily obliged to pay for such calls, from the several times when the same were payable and paid, to the time of the commencement of this suit, and had been otherwise injured and damnified.

Second count.

The second count stated, that, the plaintiff being such holder and entitled to the several certificates in the first count mentioned, and the contract between the plaintiff

and the defendant having been made and broken as was therein expressed, and the defendant having become insolvent, and being unable to satisfy the claim of the plaintiff in respect of the breach of contract by the defendant in the first count mentioned, and being also unable to satisfy certain other claims and demands of the plaintiff upon the defendant, thereupon, in consideration that the plaintiff would forbear and give time to the defendant for a month in respect of that claim and the said other claims and demands, the defendant promised the plaintiff that the plaintiff should in the end come out without a farthing's loss, and that the defendant should then be either out of the plaintiff's debt, that is to say, would either satisfy the last-mentioned claim of the plaintiff, and the said other claims and demands of the plaintiff upon the defendant, or that the defendant would secure the same to the plaintiff's satisfaction: Averment, that the plaintiff did accordingly forbear and give time to the defendant for a month in respect of that claim and the said other claims and demands, according to the said contract, and that all things necessary to entitle the plaintiff to commence and maintain the action as to that second count had been observed and performed and had happened; and that afterwards the defendant departed from this realm to parts beyond the seas, that is to say, to California, and then became and still was solvent and able to satisfy the last-mentioned claim of the plaintiff; and before the commencement of the suit, that is to say, whilst the defendant was in such parts beyond the seas, a reasonable time had elapsed for the defendant to secure the same claim to the plaintiff's satisfaction, according to the said contract: Yet that the defendant had broken his said contract, and had never been out of the plaintiff's debt, and had never satisfied the same claim of the plaintiff, nor had the defendant secured the same to the plaintiff's

1854.

DEACON
v.
GRIDLEY.

1854.

DEACON
v.
GRIDLEY.

satisfaction, according to the said contract : and thereby and by reason of the premises, the damages specially mentioned and alleged in the first count had severally and respectively arisen and happened to the plaintiff in manner and form as therein was expressed, and the plaintiff had not in the end come out without a farthing's loss, but had sustained the several losses and damages therein and in the first count mentioned, contrary to the said contract of the defendant.

Third count.

The third count stated, that, the plaintiff being possessed as of his own property of one hundred certificate of one hundred shares in the undertaking called the Demerara Railway Company, the defendant converted the same to his own use.

Fourth count.

The fourth count stated that the defendant wrongfully detained from the plaintiff the several certificates in the third count mentioned.

Fifth count.

The fifth count stated, that, before and at the time the writing the letter and making the contract there~~in~~ in that count mentioned, the claims of the plaintiff in the first, third, and fourth counts of the declaration ~~had~~ severally arisen and accrued in manner and form therein was expressed, and the defendant ought then to have paid or satisfied the plaintiff for and in respect of those several claims, and the defendant had from time to time been requested by the plaintiff so to do, and the defendant had from time to time requested the plaintiff to give him time, and to forbear and grant to him indulgence for the payment or satisfaction of the plaintiff's said claims, which the plaintiff had accordingly done; and thereupon the defendant, being then insolvent and unable to pay or satisfy the several claims of the plaintiff against the defendant in that count mentioned, and for the purpose of inducing the plaintiff to continue such indulgence, and to obtain further time for the payment or satisfaction of the same claims of the plaintiff, and of

1854.

DEACON
v.
GRIDLEY.

certain other claims of the plaintiff against the defendant, wrote, addressed, and sent to the plaintiff a letter concerning the several claims aforesaid, which letter was and is in these words and figures, that is to say,—

“5, Southampton Street, Bloomsbury Square, Thursday
 4 p. 3. My dear Deacon,—I am indeed grieved at the tone of your letter, which I have just received. When a man falls, there are many to condemn him, and but few, and often none, to commiserate him. Misfortune has always been, and ever will be, deemed a fault. That I have wronged you in not having, because incapable, repaid or returned that which you lent me (thereby meaning and referring, amongst other loans, to the said loan of the said certificates in the first court mentioned), were useless for me to deny. But, how I have wronged you in feeling,—seeing that I have ever, as I do now, entertain for you the sincerest gratitude and regard,—I know not, beset as I am in difficulties on every side, not resulting from extravagance, but from bad fortune. I know how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence (thereby meaning that the defendant did then entreat and ask for indulgence from the plaintiff for the payment or satisfaction of the said claims of the plaintiff); yet will I say that the most anxious endeavour and hope of every future day shall be, to prove my regard and gratitude in the only way in which the world esteems the proof, by restoring to you all that I owe (thereby meaning, amongst other things, the payment or satisfaction of the said claims of the plaintiff). The Newcastle shares were sold for 350*l*. Of the Manchester and Southampton shares, Oswin has bought back eighty. For the Derbyshire shares which I bought of you, I got 9*s*. per share. The Demerara shares (meaning the said one hundred certificates of the said one hundred shares in the said undertaking called The Demerara Railway Com-

1854.

 DEACON
 v.
 GRIDLEY.


pany) are held by Mr. J. W. Robins, 29 Threadneedle Street, city, the balance due to him from me on last account day being 248*l.*, to which has to be added whatever loss may be found on the closing of the account which was carried over in July. 'Tis not in your nature to close the ear to the sorrows of others, or to steel your heart against them. Regard, therefore, with indulgence and pity, and not with reproach and anger, one with whom some happy hours have been passed, whom overpowering circumstances and relentless fate have now brought to real misery, but who is still not the less sincerely and deeply obliged: yours always, H. Gillet Gridley. C. E. Deacon, Esq.:" That, in pursuance of that letter, and on the faith of the promises of the defendant contained therein, the plaintiff, at the request of the defendant, did continue to give him time and to forbear and to grant to him indulgence and further time for the payment or satisfaction of the several claims aforesaid, as to certain of those claims, until the same were paid and satisfied, and, as to the residue, that is to say, the claims of the plaintiff in the first, third, and fourth counts mentioned, until the commencement of this suit, being a reasonable and proper time in that behalf; and although a reasonable time had elapsed before this suit for the performance by the defendant of his said contract in the said letter contained, and although all things necessary to entitle the plaintiff to commence and maintain this action as to the fifth count had been observed and performed, and had happened, yet the defendant had broken his said contract; and although, after the making of that contract, the defendant departed from this realm, and went to parts beyond the seas, to wit, to California, and was solvent and able to pay and satisfy, and still was able to pay and satisfy the claims of the plaintiff in the first, third, and fourth counts respectively mentioned, and a reasonable time

for doing so had elapsed; yet the defendant had not restored to the plaintiff all that he owed, and still owes, but had neglected and refused, and still neglected and refused, to pay or satisfy the said claims of the plaintiff in the first, third, and fourth counts mentioned, contrary to his said contract in that behalf so made as aforesaid.

The defendant demurred to the last count,—the ground of demurrer being, that no contract between the plaintiff and the defendant, or other cause of action, is stated therein, and that the letter therein set forth, and on which the count is founded, is not a contract, and is nudum pactum.

The plaintiff joined in demurrer.

Lush, in support of the demurrer. (a) The fifth count discloses no cause of action. There is nothing in the letter therein set out which professes to be, or could be intended to be, a contract; and there is no consideration which would sustain it if it were so. From beginning to end, the letter amounts to no more than a sentimental apology and lamentation over the writer's misfortunes. The only part of it which at all bears the aspect of a promise, is, that where the defendant says, "I know

(a) The points marked for argument on the part of the defendant, were,—“1. That the fifth count shews no contract or other cause of action, inasmuch as it shews no agreement to which the plaintiff was a party: 2. That the defendant's promise contained in his letter, is nudum pactum: 3. That it is a mere accord, and not founded upon any new consideration, or mutually binding on the plaintiff and the defendant, so as to substitute a new

cause of action. 4. That an acknowledgment of, or a promise to make compensation in respect of, a cause of action for unliquidated damages, is not a cause of action. 5. That no breach of the defendant's promise contained in his letter is stated; such promise being, to restore to the plaintiff all that defendant owed, and not being a promise to make him compensation in respect of the causes of action in the first, third, or fourth counts.”

1854.

DEACON
v.
GRIDLEY.

1854.

DEACON

v.

GRIDLEY.

how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence: yet will I say that the most anxious endeavour and hope of every future day shall be, to prove my regard and gratitude in the only way in which the world esteems the proof, by restoring to you all that I owe." This is put upon the ground of forbearance. But there is no contract of forbearance. The plaintiff does not allege that he intended to sue. It is a mere acknowledgment of an existing debt. There is no new contract. This is, in effect, a novel mode of setting out evidence. [*Maule, J.* If it amounts to evidence to take the case out of the statute of limitations, an action may be sustained upon it.] It discloses nothing more than the original cause of action. [*Jervis, C. J.* In that case, the defendant should have applied to a judge to strike out the count, as being in substance the same as the others, or one of them.] It is a mere promise without consideration. [*Maule, J.* In effect, it shews that the defendant was indebted to the plaintiff in certain sums, and, being so indebted, promised to pay.] An unliquidated demand. [*Bullar.* In fact, the loan was a loan of shares, to be returned. *Maule, J.* Then it is an informal count in detinue. If you shew that the defendant has had placed in his hands chattels of the plaintiff, and agreed to return them, but has not done so, that is detinue. The circumstance of special damage being added makes no difference.] The whole is a claim for unliquidated damages. The first count is debt for certificates of shares; the third is, trover for other certificates; and the fourth is, detinue for the certificates in the third count. The defendant being liable for unliquidated damages in respect of these several things, his letter promising to pay affords no new substantive ground of action. To found a contract, there must be some consideration: here there is none. [*Crowder, J.* It seems to be a perfectly

useless count. The question is, whether it is bad in substance. There is nothing more in it than in the other three counts. *Maule, J.* It will be necessary, to succeed upon this demurrer, to go further, and to say that the count in question does not contain what the other three do contain,—a *promise* to pay.] It states the existence of the claims in the other three counts as the only consideration for the promise, such as it is. It is submitted that there is no consideration, and no promise.

1854.

DEACON
v.
GRIDLEY.

Bullar, contra. (a) An absolute promise to pay a debt which may or may not be barred by the statute of limitations, constitutes such a cause of action as may be declared upon. The letter set out in the fifth count contains an absolute promise to restore or pay to the plaintiff all the defendant owes him. The first count is upon a contract for a loan of railway shares, to be returned on request. Debt in the detinet lies for chattels: Com. Dig. *Pleader* (2 W. 8.) [*Maule, J.* Debt and debt in the detinet may both be maintained for chattels. The difference between debt and detinue, as to chattels, is this,—If I deliver to J. S. (or he becomes possessed of) chattels which he is bound to return to me, and does

(a) The plaintiff's points were,—“1. That the last count discloses a good consideration for the contract set forth: 2. That the demurrer admits the sense attributed to the letter in the last count, which sense might have been proved by other letters of the defendant shewing the circumstances under which the letter was written and explaining the intention of it: 3. That the plaintiff having, at the defendant's request, granted him indulgence until

he was able to pay the plaintiff's claim, is a good executed consideration for the defendant's promise to pay when he was able, even although the plaintiff might not have been bound to grant such indulgence: 4. That the defendant's contract is analogous to a contract by A. to pay B. for any goods he may supply to C., which becomes binding on A. when B. supplies the goods, although B. is not bound to supply them.”

1854.

 DEACON
 v.
 GRIDLEY.

not, *detinue* is the proper form ; whereas, if a man contracts to deliver me a horse, or a fat capon, or the like, *debt* is the proper form of action to enforce the obligation. Lord Coke says,—“ If I grant to give a man 40*s.* or a robe, &c., after Easter, he may bring *debt* for the one or the other.”] Supposing *debt* to be maintainable on the first count, an absolute promise in writing to pay the debt affords a new and substantive cause of action. It was so held in *Lechmere v. Fletcher*, 1 C. & M. 623. There, A. and B. were jointly indebted to C.; after more than six years had elapsed since the debt accrued, A. promised in writing signed by him to pay his proportion when applied to. Afterwards, C. sued A. and B. jointly, in *indebitatus assumpsit*, on the original joint cause of action. B. pleaded the general issue, and A. pleaded the general issue and the statute of limitations. A verdict passed against B. on the general issue, and for A. upon the general issue and upon the issue on the statute of limitations; and judgment was entered for C. against B., and for A. against C. C. afterwards brought a fresh action against A., and declared specially on the new promise to pay his proportion: and it was held, that neither the recovery against B., nor the verdict and judgment for A., were any answer to the action against A. on the new promise. [*Williams, J.* The declaration there stated that the cause of action against the two was barred by the statute of limitations. *Maule, J.* And it states a contract different from that which existed before, viz. a promise by Fletcher to pay his *proportion* of the joint debt. He was before a joint-contractor with Fulljames to pay the *whole* debt: by the new promise, he incurred a separate liability to pay *half*.] That is not the ground upon which Bayley, J., puts it: he says, that, “ where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other.” [*Maule, J.* Mr. Baron

Bayley expressly says,—“In the present case, the original debt was joint, but, afterwards, a new separate contract was entered into by the defendant, binding him only, and binding him to a different extent from that to which the original joint contract would have bound him. He was, originally, bound for the whole debt; but, under the separate contract, his liability is limited to his proportion only.”] The cause of action here is, not the original contract, but the contract declared on: the plaintiff had his option to declare on the original contract, or upon the two, as he has done here. [*Williams*, J. Suppose a promise to pay, in the most explicit terms, without writing, made within the six years,—when does the cause of action arise?] Here, it would be, when the defendant’s ability arises,—*Tanner v. Smart*, 6 B. & C. 603, 9 D. & R. 549; *Waters v. The Earl of Thanet*, 2 Q. B. 757, 2 Gale & D. 166. [*Jervis*, C. J. That is not the case put by my Brother Williams. He puts the case of an absolute and unconditional promise, at the end of five years and a half. Does that make a contract from which the limitation is to run?] If in writing, it would constitute a new cause of action. [*Crowder*, J. You contend, then, that a different rule prevails since the 9 G. 4, c. 14, requiring the promise to be in writing?] I do. The promise to pay is the substitution of a new cause of action. In *Bird v. Gammon*, 3 N. C. 883, 5 Scott, 213, a letter much less strong than this, was held a sufficient acknowledgment and promise to revive a debt: the defendant wrote,—“I do wish I could comply with your request, for really I am and have been very wretched indeed on account of your account not being paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, and considerably reduce your account. At all events, if it does not, the concern must be broken up to meet it at last. My hope is, that, out of the present harvest, you will be

1854.

 DEACON
 v.
 GRIDLEY.

1854.

 DRACON
 v.
 GRIDLEY.

paid." [Maule, J. Can you declare against a man for goods sold and delivered, and then, in another count, say that the defendant, being so indebted for the goods in the first count, promised to pay?] Here, the first count is incorporated in the fifth. [Maule, J. Not so incorporated as to make a cause of action.] It is submitted that there is a good consideration for the defendant's promise, on the ground that there is a request for forbearance. The defendant in an oblique way asks indulgence. [Maule, J. The letter seems to me to be a tolerably successful attempt to say nothing.] The promise is made in consequence of the request to forbear. Tindal, C. J., in delivering the judgment of the court, in *Kaye v. Dutton*, 7 M. & G. 807, 8 Scott, N. R. 495, says,—“Two objections were made to the declaration,—first, that it did not shew any consideration for the promise by the defendant,—secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz. *Brown v. Crump*, 1 Marsh. 567, 6 Taunt. 300, *Granger v. Collins*, 6 M. & W. 458, *Hopkins v. Logan*, 5 M. & W. 241, 7 Dowl. P. C. 360, *Jackson v. Cobbin*, 8 M. & W. 790, 1 Dowl. N. S. 96, and *Roscorla v. Thomas*, 3 Q. B. 234, 2 Gale & D. 508, certainly support that proposition to this extent,—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must

be nudum pactum, there remaining no consideration to support it. But the case may perhaps be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, *at his request*, under circumstances which would not raise any implied promise. In such cases, it appears to have been held in some instances that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate*, Dyer, 272, and several cases mentioned in the margin of the report of that case, seem to go to that extent: as also do some others collected in Rol. Abr. *Action sur Case* (2)."

1854.

 DRACON
v.
GRIDLEY.

Lush, was not called upon to reply.

JERVIS, C. J. I am of opinion that our judgment ought to be for the defendant upon the demurrer to the fifth count. The argument on behalf of the plaintiff in support of that count proceeded upon two points; but the count itself professes to rely upon one ground only, viz. a consideration of forbearance,—to raise which, there must be a request from the defendant for forbearance, and a forbearance by the plaintiff in consequence of that request. But I do not think that the plaintiff's letter, which is set out in the fifth count, amounts to anything of the sort. That letter does not ask for indulgence or forbearance. The writer says: "I know how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence." It was unnecessary for the defendant to ask for indulgence, seeing that he was in a condition of hopeless insolvency. It seems to me, therefore, that the fifth count, so far as regards the only consideration upon which it professes to proceed, wholly fails.

1854.

DRACON
v.
GRIDLEY.

Mr. Bullar relies also upon another ground, viz. that the letter contains a promise to pay, and that affords a sufficient foundation for the action. But, in the view I take of the case, it is unnecessary to consider whether the letter does or does not contain an absolute promise to pay the debt. It proceeds,—“Yet will I say that the most anxious endeavour and hope of every future day shall be, to prove my regard and gratitude in the only way in which the world esteems the proof, by restoring to you all that I owe.” That can hardly amount to an absolute and unqualified promise of payment. Assuming, however, that it does, the effect of the declaration is this,—The plaintiff has three separate causes of action against the defendant, viz. those contained in the first, third, and fourth counts: having those causes of action against the defendant, the defendant writes him a letter admitting his liability, and promising to pay. That was nothing more than the defendant was bound to do without the letter: and, though the letter might be evidence, it does not express any new cause of action. If the declaration had shewn that the causes of action referred to were gone but for the letter, and that letter had shewn such a promise as would revive them, so as to raise a new contract, the case might have been different. But that is not suggested. In declaring upon such a letter, the plaintiff was bound to shew upon the record circumstances to make it a cause of action. That he has not done. At the utmost, the letter amounts only to a promise without consideration, which will not sustain an action.

MAULE, J. I am of the same opinion. The fifth count refers to the first, third, and fourth counts as stating good causes of action; and then it sets out the defendant's letter. The true construction of that letter is, that it is a mere deprecation of harsh measures. The writer does not dispute his liability to the plaintiff in

respect of some debt, and he expresses a hope that he may some day be able to prove his regard and gratitude to his creditor by satisfying his demand. It does not, however, import any new contract or promise. It may be that such a letter would amount to a sufficient acknowledgment or promise, within the 9 G. 4, c. 14, to take the case out of the operation of the statute of limitations. But, when the statute does not come in question, assuming that the letter does contain an acknowledgment, or even a promise, it amounts to no more than *this*,—that a man, being liable to pay a debt, promises to pay it. Such a promise, which leaves the legal rights of the parties just where they were, creates no new cause of action. An attempt was made to throw aside that part of the count which states the letter, and to sustain it upon the introductory matter. The answer to that is, that the introductory part is used only as introduction, stating the existence of a legal liability for which the defendant is already charged. The count, if operative at all, could only be so by reason of some promise contained in the letter, and that fails, upon the grounds already stated. The count is clearly bad.

WILLIAMS, J. I am quite of the same opinion. It was argued, that, if the letter contains no consideration of forbearance, there is a promise which affords a good foundation for the fifth count. In the first place, I feel great difficulty in finding any promise at all. But, assuming that there was a promise, it is clear from the authorities that a bare promise to pay the claims referred to, without more, would afford no foundation for an action. Nothing can be clearer. It is unnecessary to consider whether, if the letter contained a request for forbearance, the count would disclose a consideration to support it; for, I find no language in that letter to justify Mr. Bullar's construction of it.

1854.

 DRACON
v.
GRIDLEY.

1854.

DEACON

v.

GRIDLEY.

CROWDER, J. I agree with the rest of the court in thinking that there is no sufficient consideration to support the fifth count, and that the count is radically bad.

Judgment for the defendant.

TALBOT v. LA ROCHE.

Nov. 2.

In an action for infringement of Talbot's patent for "improvements in obtaining pictures or representations of objects," the court refused to compel the plaintiff in his particulars of breaches to specify particularly the persons and occasions, or the particular parts of the specification alleged to have been infringed,—although the declaration merely averred an infringement in general terms.

THIS was an action for an alleged infringement of a patent.

The declaration stated that the plaintiff was and is the first and true inventor of so much of certain "improvements in obtaining pictures or representations of objects" as was not thereafter mentioned to have been disclaimed by him; and thereupon Her Majesty, Queen Victoria, by letters-patent under the great seal of Great Britain, granted the plaintiff the sole privilege to make, use, and vend the said invention within England, Wales, and the town of Berwick-upon-Tweed, for the term of fourteen years from the 8th of February, 1841, subject to a condition that the plaintiff should, within six calendar months next after the date of the said letters-patent, cause to be inrolled in the High Court of Chancery an instrument in writing, under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed: that the plaintiff did within the time prescribed fulfil the said condition: that the plaintiff, after the 1st of October, 1852, having first obtained the leave of Her Majesty's attorney-general, duly certified by his fiat and signature, for that purpose, caused to be filed and duly entered, according to the provisions of the statutes in that behalf, in the office for

filing specifications in Chancery under the Patent Laws Amendment Act, 1852, 15 & 16 Vict. c. 83, with the said specification, a disclaimer of certain parts of the said specification and invention, stating therein the reasons for such disclaimer, and such disclaimer not being such as extended the exclusive right granted by the said letters-patent; and Her Majesty's said attorney-general duly certified in his said fiat that an action might be brought in respect of any infringement committed prior to the filing of such disclaimer: and that the defendant during the said term, infringed the said patent right otherwise than in relation to the parts of the said invention so disclaimed: and the plaintiff claimed 5000*l*.

1854.

TALBOT
v.
LA ROCHE.

With the declaration were delivered the following particulars of breaches:—

"That the defendant, on the 1st of August, 1853, and on divers days between that day and the commencement of this suit, at No. 65, Oxford Street, in the county of Middlesex, infringed the plaintiff's patent, by making, using, and selling pictures and portraits made and executed according to the plaintiff's invention in the said patent, otherwise than in relation to the parts disclaimed; and also infringed the said patent, by making, using, and selling pictures and portraits whereby the plaintiff's said invention was counterfeited, imitated, and resembled."

Particulars of
breaches.

The defendant applied by summons for further and better particulars, whereupon the plaintiff delivered the following:—

"The plaintiff further says that one of such pictures and portraits was made and sold by the defendant at the place aforesaid, to Arthur Herbert Church, on or about the 27th of April last; but the plaintiff states this by way of instance and example only, and not so as to preclude him at the trial from insisting upon other above-mentioned infringements."

Further parti-
culars.

1854.

TALBOT

v.

LA ROCHE.

Specification.

The specification of the plaintiff's alleged invention was as follows :—

"The first part of my invention, is, a method of making paper extremely sensitive to the rays of light. For this purpose, I select the best writing-paper, having a smooth surface, and a close and even texture.

"*First part of the preparation of the paper.* I dissolve 100 grains of crystallized nitrate of silver in 6 ounces of distilled water. I wash one side of the paper with this solution, with a soft camel hair brush, and place a mark upon that side, by which to know it again.— I dry the paper cautiously at a distant fire, or else I leave it to dry spontaneously in a dark place. Next, I dip the paper in a solution of iodide of potassium containing 500 grains of that salt dissolved in one pint of water. I leave the paper a minute or two in this solution. I then take it out and dip it in water. I then dry it lightly with blotting-paper, and finish drying it at a fire, or else I leave it to dry spontaneously. All this process is best done in the evening, by candle-light. The paper thus far prepared may be called, for the sake of distinction, 'iodized paper.' This iodized paper is scarcely sensitive to light, but nevertheless it should be kept in a portfolio or some dark place till wanted for use. It does not spoil by keeping any length of time, provided it is kept in a portfolio, and not exposed to the light.

"*Second part of the preparation of the paper.* This second part is best deferred until the paper is wanted for use. When that time is arrived, I take a sheet of the iodized paper, and wash it with a liquid prepared in the following manner,—Dissolve 100 grains of crystallized nitrate of silver in 2 ounces of distilled water : to this solution add one sixth of its volume of strong acetic acid : let this mixture be called A. : dissolve crystallized gallic acid in distilled water, as much as it will dissolve

(which is a very small quantity) : let this solution be called B. : when you wish to prepare a sheet of paper for use, mix together the liquids A. and B. in equal volumes. This mixture I shall call by the name of gallo-nitrate of silver. Let no more be mixed than is intended to be used at one time, because the mixture will not keep good for a long period. Then take a sheet of iodized paper, and wash it over with this gallo-nitrate of silver, with a soft camel hair brush, taking care to wash it on the side which has been previously marked. This operation should be performed by candle-light. Let the paper rest half a minute, and then dip it into water ; then dry it lightly with blotting-paper ; and, lastly, dry it cautiously at a fire, holding it at a considerable distance therefrom. When dry, the paper is fit for use ; but it is advisable to use it within a few hours after its preparation. *Note*, that, if it is used immediately, the last drying may be dispensed with, and the paper may be used moist. *Note 2*. Instead of using a solution of gallic acid for the liquid B., the tincture of galls, diluted with water, may be used ; but it is not so advisable.

"Use of the paper. The paper thus prepared, and which I name 'Calotype paper,' is placed in a camera *obscura*, so as to receive the image formed in the focus of the lens. Of course, the paper must be screened or defended from the light during the time it is being put into the camera. When the camera is properly pointed at the object, this screen is withdrawn, or a pair of internal doors are opened so as to expose the paper for the reception of the image. If the object is very bright, or the time employed is sufficiently long, a sensible image is perceived upon the paper when it is withdrawn from the camera : but, when the time is short, or the objects dim, no image whatever is visible upon the paper, which appears entirely blank : nevertheless, it is impressed with an invisible image ; and I have discovered

1854.

TALBOT
v.
LA ROCHE.

1854.

TALBOT
O.
LA ROCHE.

the means of causing this image to become visible. This is performed as follows :—I take some gallo-nitrate of silver, prepared in the manner before directed, and with this liquid I wash the paper all over with a soft camel hair brush. I then hold it before a gentle fire, and, in a short time (varying from a few seconds to a minute or two), the image begins to appear upon the paper. Those parts of the paper upon which light has acted the most strongly become brown or black, while those parts on which light has not acted remain white. The image continues to strengthen and grow more and more visible during some time. When it appears strong enough, the operation should be terminated, and the picture fixed.

“ *The fixing process.* In order to fix the picture thus obtained, I first dip it into water. I then partly dry it with blotting-paper, and then wash it with a solution of bromide of potassium containing 100 grains of that salt dissolved in 8 or 10 ounces of water. The picture is then washed with water, and then finally dried. Instead of bromide of potassium, a strong solution of common salt may be used ; but it is less advisable. The picture thus obtained will have its lights and shades reversed, with respect to the natural objects, viz. the lights of the objects are represented by shades, and vice versa. But it is easy from this picture to obtain another which shall be conformable to nature, viz. in which the lights shall be represented by lights, and the shades by shades. It is only necessary for this purpose to take a second sheet of sensitive calotype paper, and place it in close contact with the first, upon which the picture has been formed. A board is put beneath them, and a sheet of glass above, and the whole is pressed into close contact by screws. Being then placed in sunshine or daylight for a short time, an image or copy is formed upon the second sheet of paper. This image or copy is often invisible at

first: but the image may be made to appear in the same way that has been already stated. But I do not recommend that the copy should be taken on calotype paper: on the contrary, I would advise that it should be taken on common photographic paper. This paper is made by washing good writing paper, first with a weak solution of common salt, and next with a solution of nitrate of silver. Since it is well known, having been freely communicated to the public by myself in the year 1839, and that it forms no part of the present invention, I need not describe it here more particularly. Although it takes a much longer time to obtain a copy upon this paper, than upon calotype paper, yet the tints of the copy are generally more harmonious and agreeable. On whatever paper the copy is taken, it should be fixed in the way already described. After a calotype picture has furnished a good many copies, it sometimes grows faint, and the subsequent copies are inferior. This may be prevented, by means of a process which revives the strength of the calotype pictures. In order to do this, it is only necessary to wash them by candle-light with gallo-nitrate of silver, and then warm them. This causes all the shades of the picture to darken considerably, while the white parts are unaffected. After this, the picture is of course to be fixed a second time. The picture will then yield a second series of copies; and a great number of them may frequently be made. *Note.* In the same way in which I have just explained that a faded calotype picture may be revived and restored, it is possible to strengthen and revive photographs which have been made on other descriptions of sensitive photographic paper: but these are inferior in beauty, and moreover the result is less to be depended upon. I therefore do not recommend them.

"The next part of my invention consists in a mode of obtaining positive photographic pictures, that is to say,

1854.

 TALBOT
 v.
 LA ROCHE.

1854.

TALBOT

v.

LA ROCHE.

photographs in which the lights of the objects are represented by lights, and the shades by shades. I have already described how this may be done by a double process : but I shall now describe the means of doing it by a single process. I take a sheet of sensitive calotyp paper, and expose it to daylight until I perceive a slight but visible discoloration or browning of its surface. This generally occurs in a few seconds. I then dip the paper into a solution of iodide of potassium of the same strength as before, viz. 500 grains to one pint of water. This immersion apparently removes the visible impression caused by the light : nevertheless, it does not really remove it ; for, if the paper were to be now washed with gallo-nitrate of silver, it would speedily blacken all over. The paper when taken out of the iodide of potassium is dipped in water, and then lightly dried with blotting paper : it is then placed in the focus of a camera obscura which is pointed at an object : after five or ten minutes the paper is withdrawn, and washed with gallo-nitrate of silver, and warmed as before directed : an image will then appear of a positive kind, viz. representing the lights of the object by lights, and the shades by shades. Engravings may be very well copied in the same way and positive copies of them obtained at once (reversed however, from right to left). For this purpose, a sheet of calotype paper is taken, and held in daylight, to darken it, as before mentioned : but, for the present purpose, it should be more darkened than if it were intended to be used in the camera obscura. The rest of the process is the same. The engraving and the sensitive paper should be pressed into close contact, with screws or otherwise, and placed in the sunshine, which generally effects the copy in a minute or two. This copy, if it is not sufficiently distinct, must be rendered visible, or strengthened, with the gallo-nitrate of silver as before described.

"I am aware that the use of iodide of potassium for obtaining positive photographs, has been recommended by others; and I do not claim it here by itself as a new invention, but only when used in conjunction with the gallo-nitrate of silver, or when the pictures obtained are rendered visible or strengthened subsequently to their first formation. In order to take portraits from the life, I prefer to use for the object glass of the camera a lens whose focal strength is only three or four times greater than the diameter of the aperture. The person whose portrait is to be taken should be so placed that the head may be as steady as possible; and, the camera being then pointed at it, an image is received on the sensitive calotype paper. I prefer to conduct the process in the open air under a serene sky, but without sunshine. The image is generally obtained in half a minute or a minute. If sunshine is employed, a sheet of blue glass should be used as a screen to defend the eyes from too much glare, because this glass does not materially weaken the power of the chemical rays to affect the paper. The portrait thus obtained on the calotype paper is a negative one, and from this a positive copy may be obtained in the way already described.

"I claim,—First, the employing gallic-acid, or tincture of galls, in conjunction with a solution of silver, to render paper which has received a previous preparation, more sensitive to the action of the light:

"Secondly, the making visible photographic images upon paper, and strengthening such images when already faintly or imperfectly visible, by washing them with liquids which act upon those parts of the paper which have been previously acted upon by light:

"Thirdly, the obtaining portraits from the life by photographic means upon paper:

"Fourthly, the employing bromide of potassium, or

1854.

TALBOT
v.
LA ROCHE.

1854.

TALBOT

v.

LA ROCHE.

Defendant's
affidavit.

some other soluble bromide, for fixing the images obtained."

Upon an affidavit of the defendant, stating, that this action was brought to recover damages in respect of alleged infringements by him of the plaintiff's patent "for improvements in obtaining pictures or representations of objects;" that the pictures made by the defendant are produced by a process commonly called and known as "the collodion process," and which process differs entirely from those described in the plaintiff's specification, and could not, as the deponent was advised and believed, be considered as an infringement of the plaintiff's patent; that the plaintiff in his specification describes various processes, all of which he claims to be within the protection of his patent; that the deponent did not know which of the said processes so described in the said specification the plaintiff intended to allege the deponent had infringed; that the deponent had been advised and believed that the evidence that would be required in order to meet any case that might be set up at the trial to prove an infringement of any one of the processes mentioned in the specification, would be entirely different from that which would be required to meet the proof of infringement of any other of the processes; and that, consequently, the deponent was greatly embarrassed and perplexed, and would be put to great and unnecessary expense and trouble in preparing his defence to the action, unless the court directed the plaintiff to furnish him *full particulars* of such breaches of the plaintiff's patent as he, the plaintiff, intended to rely on at the trial.

Hannen moved for a rule calling upon the plaintiff to shew cause why he should not deliver to the defendant further and better particulars of the infringements of the patent complained of. He submitted that the plaintiff

should specify more particularly the persons with respect to whom, and the occasions upon which, the alleged infringements occurred; and that he should point out with reasonable precision the particular parts of the specification which the defendant had used. The specification sets forth a great many processes,—some of which are claimed as new, and all distinct in their nature,—leading to the production and perpetuation of pictures upon paper. Before the passing of the recent statute, the court, of its own authority, sometimes called upon the plaintiff to give particulars of infringements, where the justice of the case seemed to require it. Thus, in *Perry v. Mitchell*, 1 Webster, P. C. 269, which was an action for the infringement of two letters-patent for improvements in pens, the specification set forth and described thirteen different pens, containing an indefinite number of slits and adjustments: the declaration assigned as breaches, the making, &c., of pens and nibs in imitation of parts of the said invention, with divers additions thereto and subtractions therefrom: and the court of Exchequer compelled the plaintiff to deliver particulars in writing of the infringements on which he intended to rely, specifying the particular pens shewn in the drawings annexed to the specification in respect of which such infringements had taken place. The delivery of particulars in these cases is now regulated by the 15 & 16 Vict. c. 83, the 41st section of which provides, that, in any action for the infringement of letters-patent, the plaintiff shall deliver with his declaration particulars of the breaches complained of in the action, &c., and at the trial of such action, &c., no evidence shall be allowed to be given in support of any alleged infringement, &c., which shall not be contained in the particulars delivered. It must be assumed that the legislature intended that the particulars should give some information which the declaration does not convey. The defendant's affidavit

1854.

TALBOT
v.
LA ROCHE.

1854.

 TALBOT
 v.
 LA ROCHE.

states that the several processes mentioned in the specification are entirely different from each other, and different from that used by the defendant. [*Jervis*, C. J. The question will be whether the defendant's process falls within what is called a chemical equivalent.] The 43rd section, which enacts, that, in taxing the costs in any action for infringing letters-patent, regard shall be had to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particulars unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause,—throws some light upon the intention of the legislature in framing the 41st section; for, if this general form of particular is allowed, the plaintiff would not be brought within the operation of s. 43. [*Maule*, J. Would you be satisfied if the plaintiff says that your "collodion process" amounts in substance to an infringement of his process?] That, it is submitted, would not be sufficiently precise. The specification describes two modes of producing pictures, by totally different processes. [*Jervis*, C. J. If the two processes described in the specification are wholly distinct from each other, and the defendant's process may be an infringement of the one, and not of the other, he ought to have better particulars. But, if the whole is substantially one process, he is not entitled to them.] The defendant surely is entitled to be informed as to which particular process he has infringed. [*Jervis*, C. J. We must not make the particulars more complicated than a specification.] The particulars originally delivered stated an infringement by making and selling pictures and portraits according to the plaintiff's invention, within certain dates. The amended particulars give one instance only. The plaintiff must know what he intends to prove.

JERVIS, C. J. I am of opinion that the defendant is not entitled to any further or better particulars in this case. Under a plea of want of novelty, the court requires the particulars of objections to condescend upon particular instances. But that is very different from this case; the matter there is not in the knowledge of the patentee. But the defendant must know whether and in what respects he has been guilty of an infringement.

1854.

TALBOT
v.
LA ROCHE.

MAULE, J. I agree with my Lord Chief Justice in thinking that there should be no rule in this case. It is said that the plaintiff knows what he intends to prove. He may intend to call the defendant as a witness: but he cannot go to the defendant before bringing the action, and examine him as to the particular instances of infringement of which he has been guilty. I think the particulars already furnished are all that the plaintiff can reasonably be called upon to give.

The rest of the court concurring,

Rule refused.

SMITH and Another v. HUMBLE.

Nov. 20.

THE declaration stated, that, by indenture dated the 7th of January, 1846, made between Robert Strong, of the first part, Thomas Rider the younger, of the second part, and the defendant, of the third part, the said Robert Strong demised to the defendant certain buildings, land, and premises at Southwark, in the county of Surrey, except as therein excepted, to hold the same

A. demised land to B. upon a building lease, at the yearly rent of 60*l.*, clear of all rates, assessments, &c., the sewers-rate, land-tax, and landlord's property or income-tax only excepted, with the usual covenants for the payment of rent, &c. B. having by building on the land increased its rateable value to 300*l.* per annum:—Held, that he was only entitled to deduct the sewers-rate and land-tax upon the original rent, and not in respect of the improved value.

1854.

SMITH
v.
HUMBLE.

from the 24th of June then last past for seventy-nine years then next ensuing; yielding and paying therefore yearly during the said term to the said Robert Strong, his heirs and assigns, the clear yearly rent of 60*l.*, &c., clear of all parliamentary, parochial, and other rates, assessments, and deductions whatsoever (the sewers-rate, land-tax, and landlord's property or income-tax, only excepted),—the first of such quarterly payments to be made on the 25th of March then next: And the defendant did thereby covenant with and to the said Robert Strong, his heirs and assigns, that he, the defendant, his executors, &c., should and would, from time to time, and at all times, during the said term, well and truly pay, or cause to be paid, unto the said Robert Strong, his heirs and assigns, the rent thereby reserved, at the times and in the manner thereinbefore appointed for the payment thereof, without any deduction or abatement whatsoever (except on account of the sewers-rate, land-tax, and landlord's property or income-tax), according to the true intent and meaning of the said indenture; and also should and would well and truly pay, satisfy, and discharge all parliamentary, parochial, and all other taxes, rates, duties, and assessments whatsoever then or during the said term to be charged, assessed, or imposed upon the said demised premises, or upon the landlord or tenant in respect thereof (except as before excepted): Averment, that, at the time of the making of the said demise, the said Robert Strong was seised of the said demised premises in his demense as of fee, and continued so seised, subject to the said demise, until and at the time of making the indenture next mentioned and that, after the said demise was so made, to wit, on the 9th of January, 1847, by an indenture then made by and between the said Robert Strong, of the one part, and Ann Stanton Smart of the other part, in pursuance and by virtue of the act for rendering a relea

as effectual for the conveyance of freehold estates as a lease and release by the same parties, the said Robert Strong granted and released the reversion of and in the said demised premises unto the said Ann Stanton Smart, her heirs and assigns, to have and to hold the same unto the said Ann Stanton Smart, her heirs and assigns, to the use of the said Ann Stanton Smart, her heirs and assigns, for ever: that, by virtue thereof, the said Ann Stanton Smart became seised of the said reversion in her demesne as of fee, and continued so seised until and at the time of making the indenture next mentioned: That, afterwards, to wit, on the 13th of January, 1850, by an indenture then made by and between the said Ann Stanton Smart, of the first part, the Rev. Robert Strong and the Rev. C. D. Strong, of the second part, and the plaintiffs, of the third part, the said Ann Stanton Smart granted and conveyed the said reversion of and in the said demised premises unto the plaintiffs, their heirs and assigns, to have and to hold the same unto the plaintiffs, their heirs and assigns, to the use of the plaintiffs, their heirs and assigns, for ever: That, by virtue thereof, the plaintiffs became and were, and still continued, seised of the said reversion in their demesne as of fee, expectant on the said lease: That, after the plaintiffs became so seised, on the 25th of March, 1854, the sum of 30*l.* of the rent aforesaid, for six months of the said term, which was yet unexpired, became and was due to the plaintiffs from the defendant under the first-mentioned indenture; and that the defendant had not paid the same, or any part thereof, and had broken his said covenant therein: and plaintiffs claimed 50*l.*

Pleas,—first, as to 13*l.* 10*s.*, part of the money claimed, that the said indenture of lease was and is duly sealed and delivered by the said Robert Strong as his deed, and, so far as regards the right of the defendant to deduct from the said rent money paid by him for land-tax and

1854.

 SMITH
 v.
 HUMBLE.

 First plea.
 Land-tax.

1854.

SMITH
v.
HUMBLE.

sewers-rates, is as follows, that is to say, &c. [describing the parties and the parcels, &c., and reciting that the lease was granted "in consideration of the expense incurred in erecting the warehouses and buildings thereinafter demised, and in consideration of the rents and covenants thereafter reserved and contained on the part of the lessee," and proceeding as follows,]—yielding and paying therefore, yearly and every year, during the said term, unto the said Robert Strong, his heirs and assigns, the clear yearly rent of 60*l.*, by equal quarterly payments, on &c. in every year, clear of all parliamentary, parochial, and other taxes, assessments, and deductions whatsoever (the sewers-rate, land-tax, and landlord's property or income-tax, only excepted): Covenant for payment of the reserved rent, without abatement except &c. Averment, that, in the said lease were also contained covenants by the defendant to repair the demised hereditaments; and that the said lease contained nothing further relevant to the right of the defendant to deduct from the said rent money paid for land-tax or sewers-rates: that the defendant built the said demised buildings before the execution of the said lease, at his own expense: that, when the said hereditaments were demised to the defendant, the same were, and thenceforth hitherto had been, of the same annual value, and were and had been in the same state and condition, and liable to be assessed to and charged with land-tax and sewers-rates upon such same annual value: . that the said Robert Strong, before and at the execution of the said lease, well knew the state and condition, and the annual value, of the said demised hereditaments, and that the land-tax and sewers-rates were chargeable as a poundage rate on the amount of the annual value of the said demised hereditaments: that, after the grant of the reversion to the plaintiffs, as in the declaration mentioned, a certain sum of money, to wit, 15*l.*, being one shilling in the pound.

upon the amount of the said annual value of the hereditaments demised by the said indenture of lease in the declaration mentioned, had been and was duly assessed and charged on the said hereditaments for the land-tax upon and in respect of the said hereditaments, for and in respect of one year next preceding, and ending on the 25th of March, 1854: that the defendant, being during that year, and thenceforth hitherto, the occupier of the said demised premises, was forced to pay, and did before this suit pay, to Her Majesty, the Queen, the said sum of 15*l.* for and on account of the said tax, and that all matters and things by law required to be done or observed, or to occur, to entitle Her said Majesty to demand and have the said sum of 15*l.* of and from the defendant, were done and observed, and did occur, before such payment: that the sum of 13*l.* 10*s.* in the introductory part of that plea mentioned, was and is part of the said sum of 15*l.* remaining unpaid to the defendant: and that the plaintiffs during all the year immediately preceding, and ending on the 25th of March, 1854, were seised as in the declaration mentioned.

Secondly,—As to 6*l.*, other part of the money claimed, that, after the grant of the said reversion to the plaintiffs, the Metropolitan Commissioners of Sewers, within whose jurisdiction and commission the said demised hereditaments were and are situate, duly made a district sewers-rate of 6*d.* for every pound of annual value of property rateable on the sewerage district within which the said demised hereditaments were and are situate, for a certain period of time, to wit, one year next immediately preceding, and ending on the 22nd of February, 1854; and the defendant, during all that year, was, and thenceforth hitherto had been, the occupier of the said demised hereditaments, and was forced and obliged to pay, and did before this suit pay, to the said commissioners, on account of the said

1854.

 SMITH
v.
HUMBLE.

 Second plea.
Sewers-rate.

1854.

 SMITH
 v.
 HUMBLE.

sewers-rate, the sum of 7*l.* 10*s.*, being the amount the said sewers-rate charged upon the said demised hereditaments in respect of 300*l.*, the amount of the annual value thereof: that all matters and things by law required to be done or observed, or to occur, to make such payment by the defendant on account of such sewers-rate obligatory on him, were done and observed and did occur, before such payment: that the plaintiffs were seised as in the declaration mentioned during the said year for which the said sewers-rate was imposed, and thenceforth hitherto: that one of the quarterly payments of the rent in the declaration claimed accrued due during the year for which the said sewer rate was made, and in respect of a quarter of a year wholly comprised within such year for which the said sewers-rate was made: and that so much of the first plea was true as preceded the statement therein contained, to the effect that the sum of 15*l.* was assessed upon the said hereditaments for land-tax for the year ending on the 25th of March, 1854.

The plaintiffs demurred to these two pleas; the grounds stated in the margin being,—“that the defendant was only entitled to deduct land-tax and sewer rate on the amount of rent reserved by the lease to him and not on the annual value of the demised premises.”

The defendant joined in demurrer.

Land-tax.

J. Brown, in support of the demurrer. It appears from the record that the premises in respect of which the taxes in question are imposed, are of the yearly value of 300*l.*, but leased to the defendant at the yearly rent of 60*l.* The defendant claims to be entitled to deduct land-tax and sewers-rate upon the whole annual value. The question, so far as regards land-tax, turns upon the statute 38 G. 3, c. 5, which enacts “that the several and respective tenant or tenants of all house

lands, tenements, or hereditaments which should be rated by virtue of that act, were thereby required and authorised to pay such sum or sums of money as should be rated upon such houses, lands, tenements, or hereditaments, and to deduct out of the rent *so much* of the said rate as in respect of the said rents of any such houses, lands, tenements, and hereditaments, the landlord should and ought to pay and bear; and the landlords, both mediate and immediate, *according to their respective interests*, were thereby required to allow such deductions and payments, upon the receipt of the residue of the rent." That statute authorises the tenant to deduct from the current year's rent so much of the tax as the landlord ought to bear: *Andrew v. Hancock*, 3 J. B. Moore, 278, 1 Brod. & B. 37. In *Yaw v. Leman*, 1 Wils. 21, 2 Stra. 1191, it was held that a landlord who covenants to pay land-tax, shall only pay according to the rent he receives, and not according to the rent the premises are taxed at. So, in *Hyde v. Hill*, it was held, that, under a covenant in a building-lease by the tenant to pay all the taxes except the land-tax, the landlord is only to pay the *old land-tax*, and not the additional land-tax occasioned by the improvement of the estate. Lord Kenyon there said: "The legislature did not mean that the whole of the land-tax in respect of *all* the rent should be borne by the original landlord, but each was to make that allowance in proportion to the rent which came to him. On the words of the statute, therefore, it is impossible to form a doubt. And this question does not now arise for the first time; for, in *Yaw v. Leman*, this precise question was determined." And Buller, J., added: "There was also a case in this court in the year 1765,—*Barnfactor v. Lee*, E. 26 G. 3, B. R.—where A., having granted a building lease to B. at the yearly rent of 7*l.*, which estate B. improved, and afterwards underlet for 54*l.* per annum, was held only

1854.

 SMITH
v.
HUMBLE.

1854.

SMITH
v.
HUMBLE.

liable to pay the land-tax *in proportion to the old rent.*"

The like was ruled by Abbott, C. J., in *Whitfield v. Brandwood*, 2 Stark. N. P. C. 440. *Watson v. Home*, 7 B. & C. 285, 1 M. & R. 191, is a still stronger case. There, the lessor demised for a term of years a piece of ground at a fixed annual rent: the tenant covenanted not to build on the land without the licence of the lessor: the lessor covenanted to pay all taxes already charged *or to be charged* upon or in respect of the demised piece of ground, during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises: and it was held, that the landlord was liable upon his covenant to pay the taxes *in proportion to the rent reserved, and not to the improved value.* Bayley, J., there said: "The annual rent reserved, was 79*l.* 12*s.* 6*d.* By the lease, the parties have agreed that that sum should be taken as the annual value of the premises. The covenant, in terms, is, to pay all taxes charged or to be charged upon the demised piece or parcel of ground during the continuance of the term: but that covenant must receive a reasonable construction. If it were literally construed, so as to make the landlord liable for all taxes charged in respect of the improved value, it might possibly happen, in consequence of the improved value of the premises, and the increased rate of taxation, that the landlord would have nothing to receive for the use of his land. Now, that could not have been the intention of the lessor. As soon as the lease was executed, the property might have been assessed at the annual value of 79*l.* 12*s.* 6*d.*; and, when the improvements were made, and greater rates consequently imposed, the increased burden ought in justice to fall upon that person who enjoys the benefit of the improvements. It seems to me, therefore, that, when those

improvements were made, and the premises assessed in respect of their improved value, the tenant was entitled to deduct from the rent, not the whole taxes charged, but that proportion of the taxes which would have been payable in respect of the original value of the premises." The lease in question was granted in 1846, which was long after all these cases were decided: and the parties must be assumed to be cognisant of, and to have contracted with reference to, the existing state of the law. [Jervis, C. J. Are there any authorities the other way?] None.

The sewers-rate is in no degree distinguishable from the land-tax in this respect: see 11 & 12 Vict. c. 112, ss. 76, 77, 78, 79. Sewers-rate.

1854.

 SMITH
v.
HUMBLE.

Montague Smith, contra. The defendant is entitled to deduct the land-tax and sewers-rate upon the premises demised *as they stood at the date of the lease*. The present case is distinguishable from all those cited, in this, that the premises here were of their present value at the time the lease was granted. [Jervis, C. J. The tenant builds on the land, and, in consideration of his outlay, he gets for 60*l.* a year premises worth 300*l.* a year.] In all the cases relied on, the improvements were made subsequently to the grant of the lease. Such was the case in *Yea v. Leman*, as appears from the report in *Strange*, in *Hyde v. Hill*, in *Whitfield v. Brandwood*, and in *Watson v. Home*. In *Ward v. Const*, 10 B. & C. 639, 5 M. & R. 409, it was held, that, where the owner of a house, in consideration of a premium, demised it at one third of its annual value, and afterwards redeemed the land-tax, he was entitled to receive from the tenant an annual payment equal to two thirds of the land-tax so redeemed. Parke, J., there observes that Lord Tenterden had since inclined to a different opinion from that which he had expressed in *Whitfield v. Brandwood*. Land-tax.

1854.

 SMITH
 v.
 HUMBLE.

[*Jervis*, C. J. This is substantially a case of improved value. *Maule*, J. The clause in question is merely explanatory of "all deductions:" it does not amount to an agreement on the part of the landlord to pay anything which he was not otherwise bound to pay.]

Sewers-rate.

The sewers-rate stands upon a somewhat different footing. The 79th section of the 11 & 12 Vict. c. 112, enacts, "that, as between landlord and tenant, every tenant, whether his tenancy shall have commenced before or after the passing of this act, and who if this act had not been passed, would have been entitled to deduct against or to be repaid by his landlord any sum paid by such tenant on account of the sewers-rate, shall in like manner be entitled to deduct against or to be repaid by his landlord any sum which shall be paid by him on account of a district sewers-rate under this act." [*Maule*, J. The sewers-rate is not a regular annual tax. It is a charge in respect of the improvement of the fee-simple of the land.]

Brown, in reply. It is doubtful, on the 11 & 12 Vict. c. 112, whether the sewers-rate is a landlord's tax at all. (a) At all events, the construction of the covenant contended for on the other side is unreasonable: and the authorities cited will abundantly justify the court in holding that the plaintiff's construction is the true one.

JERVIS, C. J. The authorities relied on by the plaintiff are not distinguishable: and it is better to adhere to decisions. *Watson v. Home* is expressly in point as to both charges. I think the plaintiff is entitled to judgment.

The rest of the court concurring,

Judgment for the plaintiff.

(a) See *Palmer v. Earith*, 14 M. & W. 428.

1854.

PRITCHARD *v.* The Official Manager of THE LONDON
AND BIRMINGHAM EXTENSION, NORTHAMPTON, DAVEN-
TRY, LEAMINGTON, AND WARWICK RAILWAY COMPANY,
—In re WEISS.

Nov. 24.

THE London and Birmingham Extension, Northamp-
ton, Daventry, Leamington, and Warwick Railway Com-
pany was formed and provisionally registered under the
7 & 8 Vict. c. 110, in the year 1846. No act of parlia-
ment or charter was ever obtained, nor was any deed of
settlement ever executed. In 1849, the scheme was
abandoned, and on the 26th of May in that year an
order was obtained for winding up the affairs of the com-
pany, under the statutes 11 & 12 Vict. c. 45, and 12 & 13
Vict. c. 108, and an official manager was appointed.
The plaintiff made a claim in the master's office as a cre-
ditor of the company. His claim not being allowed, he
appealed to Vice-Chancellor Knight Bruce, who decided
that his claim was to be allowed as a debt, and an action
was brought against the official manager, by direction of
the master, to ascertain the amount. The matter being
referred to an arbitrator, an award was ultimately made
in the plaintiff's favour for 3538*l.*, for which judgment
was signed on the 24th of January last, against the de-
fendant as official manager of the company. Upon this
judgment a *fi. fa.* was duly issued, and returned *nulla
bona*.

The 66th sec-
tion of the 7 &
Vict. c. 110, en-
ables a creditor
to enforce a
judgment ob-
tained against
a joint-stock
company *com-
pletely regis-
tered*, by execu-
tion against
shareholders.

The 50th sec-
tion of the
winding-up act,
11 & 12 Vict.
c. 45, provides,
that, after the
appointment of
an official man-
ager under that
act, all actions
brought
*against the
company or
any person
duly authorized
to be sued as
nominal plain-
tiff on behalf
of the company,*
shall be brought
against the offi-
cial manager.

And the 12 &
13 Vict. c. 108,
s. 1, extends the

provisions of the last-mentioned act to all partnerships consisting of more than seven
members:—

Held, that a judgment obtained against the official manager can only be enforced
against a shareholder, where the action is one which could be brought against the company
as a company, or against some person authorised to be sued on their behalf; and, conse-
quently, that the provisions of the winding-up acts do not apply to the case of an action
against a non-registered company.

1854.

In re
Weiss.

Byles, Serjt., on a former day in this term, up affidavit stating, amongst other things, that the co had no property or effects, obtained a rule, under & 8 Vict. c. 110, ss. 66, 68, calling upon F. F. W shareholder and contributory of the company, to cause why execution should not issue against him the judgment so obtained against the company.

Channell, Serjt., and *Lush*, now shewed cause. rule is moved under the statutes 7 & 8 Vict. c. 11 11 & 12 Vict. c. 45. There are two answers,—first the application is not warranted by either of statutes,—secondly, that, if it were, the case is n in which the court would interfere, inasmuch : company have been by the conduct of the plaintiff self prevented from obtaining funds which would enabled them to satisfy the judgment.

The 66th section of the 7 & 8 Vict. c. 110 (a),

(a) Which enacts “that every judgment and every decree or order which shall be at any time after the passing of this act obtained against any company *completely registered* under this act, except companies incorporated by act of parliament or charter, or companies the liability of the members of which is restricted by virtue of any letters-patent, in any action, suit, or other proceeding prosecuted by or against such company in any court of law or equity, shall and may take effect and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also, if due diligence shall have been used to obtain satisfaction of such judgment, decree, or order, execution against the property and effects of such company against the person, and effects of any share for the time being, or former shareholder of such company, in his natural individual capacity, until judgment, decree, or shall be fully satisfied, in the case of execution against any former shareholder, that such former shareholder was a shareholder of such company at the time when the contract or engagement for such judgment, decree, or may have been obtained entered into, or became a shareholder during the time

does not warrant the application; that statute not applying to companies which are not completely registered. Then, does the 11 & 12 Vict. c. 45, warrant it? That will depend mainly upon the 50th and 57th sections. The 50th section provides, that, after the appointment of an official manager under the act, all actions to be commenced or instituted by any person against such company, or any person duly authorised to be sued as the nominal defendant on behalf of the same, shall be instituted against the official manager. And s. 57 enacts "that all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner as if such judgments had been entered up against such company, or against any person duly authorised to be sued on behalf of the same." The judgment here, it is true, is a judgment against one who is described as the official manager of this company. But the 57th section has relation only to such actions as may be brought against the company as a company; and the other provisions of the act shew that the company cannot be sued as such until completely registered. [Maule, J. The winding-up act meant that the official manager should act, but not that the official manager should be sued where the company has no capacity of being sued. One can very well understand why it should be so. It is not necessary that a company

1854.

In re
WEISS.

contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, decree, or order being obtained; provided also, that, in no case shall execution be issued on such judgment, decree, or order, against

the person, property, or effects of any such former shareholder of such company, after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of such company."

1854.

In re
WEISS.

should be complete, for the purpose of winding it up.] *Jervis*, C. J. Should you not have objected to the judgment?] Mr. Weiss is no party to the judgment. The object of the statute was, merely to put the official manager in the place of the body corporate. This is shewn by the 62nd section. The 12 & 13 Vict. c. 100, s. 1, merely extends the winding-up machinery, but does not affect the rights of the parties. [*Maule*, J. The statute does not affect to vary the *rights* of parties, but only to provide for the mode of enforcing them. It would be a monstrous thing for an act of parliament to alter parties' rights: but modes of procedure are constantly being altered by the legislature.]

Byles, Serjt., and *Ball*, in support of the rule. The remedy given by the 7 & 8 Vict. c. 110, s. 66, is extended by the winding-up acts to companies that are only provisionally registered. It had been held by Vice-Chancellor Knight Bruce, with reference to the 11 & 12 Vict. c. 45, that its provisions ought not to be put in force, except with regard to companies clearly and plainly coming within their meaning,—*Ex parte Burge, In re Herne Bay Pier Company*, 1 De G. & S. 588; *Ex parte Spackman, In re The Agriculturist Cattle Insurance Company*, 1 De G. & S. 599; *Ex parte Barber, In re The London and Manchester Direct Independent Railway Company*, 13 Jurist, 82; and accordingly his honour excluded provisionally registered companies from the operation of the act. But the Lord Chancellor, on appeal, in the last-mentioned case,—*Ex parte Barber, In re The London and Manchester Direct Independent Railway Company*, 1 M.N. & G. 176, 1 H. & Tw. 238,—held that railway companies were commercial companies, and, as such, were within the provisions of the act. All doubt, however removed by the second winding-up act, 12 & 13 Vict. c. 108, s. 1, which enacts, “that, notwithstanding as

thing in the 11 & 12 Vict. c. 45 contained, importing a **more** limited application thereof, the same shall apply to **all** partnerships, associations, and companies whereof the **partners** or associates are not less than seven in number, *whether incorporated or unincorporated*, and whether **formed** or subsisting before or after the passing of the **said** act, or this act, other than and except railway companies incorporated by act of parliament, to which companies such act shall not apply." It is plain, therefore, that the plaintiff is now at least entitled to execution under the 57th section of the 11 & 12 Vict. c. 45. The plaintiff has obtained a judgment against this company. [*Maule, J.* The 57th section only applies to cases in which the company could be sued as a company.] When the 12 & 13 Vict. c. 108 passed, every company, whatever its constitution, had a person authorised to sue and be sued on its behalf, viz. the official manager, when appointed. In *McKenzie v. The Sligo and Shannon Railway Company*, 24 Law Journ., N. S., Q. B. 17, Lord Campbell says,—“I cannot think that the winding-up act (11 & 12 Vict. c. 45) at all interferes with the right of a creditor to make his judgment against the company available by execution against a shareholder, where he has shewn satisfactorily that he has exhausted all reasonable means of enforcing it against the property of the company.” [*Channell, Serjt.* That was a case within the 7 & 8 Vict. c. 110, s. 66: the company had obtained an act of parliament.]

1854.

In re
WELSH.

JERVIS, C. J. I am of opinion that this rule must be discharged, without entering into the second point which has been argued before us. There is no doubt, that, since the passing of the second winding-up act, 12 & 13 Vict. c. 108, the provisions of the former winding-up act of 11 & 12 Vict. c. 45, extend and are applicable to companies not completely registered, and even to part-

1854.

In re
WEISS.

nerships. The later act, however, merely extends the application, but does not enlarge the provisions of the earlier one: it makes those provisions apply, so far as they are applicable, to unregistered as well as registered companies, where there are words fitted for that purpose. We must, therefore, look to the 11 & 12 Vict. c. 45 alone. In order to arrive at a correct construction of the 57th section,—which provides “that all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner, as if such judgments had been entered up against such company, or against any person duly authorised to be sued on behalf the same,”—it is necessary to look at the 50th section, which enacts, that, after the appointment of an official manager under the act, all actions to be commenced or instituted by any persons against such company or any person duly authorized to be sued as the nominal defendant on behalf of the same, shall be instituted against the official manager, and see what actions can be brought against the official manager. They are only actions which may be brought against the company by name, or in which the company can be sued in the name of a public officer authorised to be sued as the nominal defendant. It was not intended by the 50th section to enable a plaintiff to sue the official manager where before the act he could only have sued individual members of the company who had incurred personal liability; but only where the whole company might be represented in a suit. It is not, as my Brother Maule observed in the course of the argument, an unusual thing for the legislature to interfere with or modify remedies, but they do not usually interfere with the *rights* of parties. The contributory sought to be affected

by this judgment, has a right to say that this was not an action which could be brought against the company, nor the judgment capable of being enforced in the manner in which it might have been enforced if the action had been brought against the company or against some officer or person representing them. The obvious meaning of the 57th section, is, that, where you can sue the company by their own name, or any person as representing them, a judgment against the official manager may be enforced against the company, and against the contributories thereof, in the same manner as if the judgment had been obtained against the company. For these reasons, I think this is not a case within the act.

1854.

 In re
WEISS.

MAULE, J. This is an application to enforce against Weiss, a contributory of the London and Birmingham Extension, Northampton, Daventry, Leamington, and Warwick Railway Company, a judgment obtained against a person who is described as the official manager of that company. Now, the only law that authorises a creditor of a company to sue the official manager, is, the 50th section of the 11 & 12 Vict. c. 45. That section provides, that, after the appointment of an official manager under the act, all actions to be commenced or instituted by any persons against such company, or any person duly authorised to be sued as the nominal defendant on behalf of the same, shall be instituted against the official manager. It is parcel of a set of provisions for winding up the affairs of joint-stock companies. It was no part of the policy or the intention of the legislature to affect the rights of the creditors of joint-stock companies, but only to modify and regulate the remedies for enforcing those rights, for general convenience. The legislature were cognisant of the fact that there were three ways in which joint-stock

1854.

In re
WEISS.

companies were usually sued,—first, by an action against them in their corporate name,—secondly, by an action against the company in the name of a public officer authorised to be sued for them,—thirdly, by an action, where the company was not perfectly formed, in which it was sought to charge some individual member or members who had so dealt with the plaintiff as to render them personally responsible to him. The winding-up act, 11 & 12 Vict. c. 45, provides for those three cases,—for the two former, by the 50th section, which enacts that, after the appointment of an official manager under the act, all actions to be commenced or instituted by any persons against such company, or any person duly authorised to be sued as the nominal defendant on behalf of the same, shall be instituted against the official manager. Then the 57th section provides “that all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner, as if such judgment had been entered up against such company, or against any person duly authorised to be sued on behalf of the same,”—that is to say, that, in the cases provided for by s. 50, the remedies of the plaintiff upon the judgment are to be unaffected by the circumstance of the official manager being sued. Then, s. 62 provides for the cases in which an individual or several members of the company may be sued in respect of their having by their conduct made themselves contractors with the plaintiff. In such a case as that, the official manager is not substituted for the defendants, but the master in Chancery may if he think fit order him to defend in the names of the parties charged, with a view to protect the interests of the company. The existence of

1854.

In re
WEISS.

that section shews strongly that the judgment in the present case is one which the statute does not authorise the plaintiff to obtain. And that disposes of the case. I therefore think the rule which seeks to charge Mr. Weiss, must be discharged with costs.

WILLIAMS, J. I am of the same opinion. The procedure which we are called upon by this rule to authorise, is the creature of the statute 7 & 8 Vict c. 110. I concur with the Lord Chief Justice and my Brother Maule, that the object of the winding-up act was merely to substitute the official manager as defendant in those cases where before the remedy was against the company by its corporate name or in the name of one authorised to sue and be sued for them. It is clear, therefore, that the present application has no foundation; and the rule must be discharged.

CROWDER, J. I am of the same opinion. The 66th section of the 7 & 8 Vict. c. 110 distinctly points out the effect of a judgment as against companies which are completely registered. The question is, whether the 50th section of the 11 & 12 Vict. c. 45 is confined to actions against companies completely registered, or is to be extended to all actions against persons as members of joint-stock companies, whether registered or not. When we look at the language of the 50th section, I think it is impossible to hold it to be applicable in the extended way contended for by my Brother Byles. It provides, that, after the appointment of an official manager under the act, all actions to be commenced or instituted by any persons *against such company, or any person duly authorised to be sued as nominal defendant on behalf of the same*, shall be instituted against the official manager. It appears to me that these words "against such company," or "any person duly authorised to be sued as nominal de-

1854.

In re
WRISS.

fendant on behalf of the same," can only refer to such actions as could be brought *against the company*. Then comes the 57th section, which enacts that all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner, as if such judgments had been entered up against such company or against any person duly authorised to be sued on behalf of the same. Nothing can be clearer than that that section must be construed with reference to the 50th section: the judgment (in an action against the official manager) is to have the like effect and operation as if it had been obtained *against the company* or *against a person authorised to be sued on behalf of the company*. That must proceed upon the principle that the action is properly brought, where the company is completely registered.

Rule discharged, with costs.

Byles, Serjt., prayed that the rule might be discharged *without* costs, observing that the point was a new one, and that the party brought before the court was not a stranger to the company.

Per Curiam. There is no reason for deviating from the ordinary rule.

1854.

In the Matter of EDWARD VANN.

Nov. 7.

A RULE was obtained by *Finlason*, in Trinity Term last, at the instance of one David Wilson, calling upon Edward Vann, an attorney of this court, to shew cause why he should not deliver to Wilson a bill of costs in all causes and matters wherein he had been concerned for Wilson, and why he should not give credit therein for all sums of money received from or on account of Wilson.

The matter had already been before Williams, J., at Chambers; but that learned judge had declined to make any order, leaving the party to apply to the court.

The affidavit upon which the rule was obtained, stated, that, in the month of November, 1848, Wilson retained Vann as his attorney to defend him against a charge preferred against him at the police court, Worship Street; that, having to appear again upon bail, the deponent (Wilson) called upon Vann to pay him for his services; that Vann refused to state what his charges were, but informed the deponent, that, upon the next hearing, he would employ eminent counsel, and would require a deposit of a large sum of money to secure him against the expense he would be put to in conducting the defence; that the sum demanded by Vann for that purpose was 200*l.*, which the deponent gave him (at his particular request) in gold; that, within two months after his discharge from the said charge, the deponent, upon two separate occasions, called at Vann's office and asked him for an account of his charges and expenses, and to account for the 200*l.*; and that Vann on those occasions refused to render him any account, and threatened him with an indictment.

An attorney, being consulted by a client who was under a charge of criminally assaulting a female child of tender years, obtained from the client a sum of 200*l.*, to do the best he could for him, but with an understanding that no account of the transaction should be kept or rendered. Having succeeded in procuring the prisoner's discharge, the attorney was called upon after the lapse of nearly six years to deliver a bill:—The court refused to order him to do so; but referred the whole matter to the master, who in the result discharged the rule, but without costs.

1854.

In re
VANN.

Hawkins now shewed cause, upon an affidavit (amongst others) of Edward Vann, stating, that, in November, 1848, Wilson, being a married man, and a member of the board of trustees of the poor of the parish of St. Leonard, Shoreditch, was charged at the police office, Worship Street, with a criminal assault upon a female child of tender years, and applied to the deponent for advice, and entreated him to save him at whatever cost; that Wilson particularly requested the deponent to keep no record or memorandum of the business, and that no entry should be made or any account kept by the deponent touching anything that might be done in relation to the charge; that Wilson also requested the deponent not to allow any of his clerks to know anything of the matter, and stated that he did not wish for any account or explanation as to what might be paid by the deponent to the friends of the child, or their attorney, but requested to be allowed to place in the deponent's hands a sum of money, to do the best he could with on his behalf; that, whilst out on bail on the said charge, Wilson placed in the deponent's hands a sum of 200*l.*, wherewith to "pay, satisfy, and discharge all the costs, charges, and expenses of the defence of Wilson against the said charge, and also all the moneys which it might be necessary to pay in order to free him from the said charge, or to induce the friends of the child to forego the further prosecution thereof, and to forego any action for damages for the alleged assault; and that the deponent then agreed with Wilson to receive, and did receive from him the said sum of money, and then agreed to bear the said Wilson harmless from all costs, damages, &c., in relation to his defence and his liberation from the said charge;" that it was then, at the express request of Wilson, agreed by the deponent that no account in writing, or otherwise, was to be kept or rendered by the deponent to Wilson of any costs, charges, dis-

1854.

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1854.

IN re
VANN.

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bursements, or expenditure relating to the said defence, or the liberation of Wilson from the said charge, or of the said sum of money; that the deponent did afterwards apply and dispose of the said sum of money for the benefit of Wilson, in accordance with the terms upon which he so received it; that, at the instigation and request of Wilson, before he was finally liberated from the said charge, several private conferences took place between the deponent and the solicitor for the prosecution, and other parties, on the subject of the charge, the particulars of which conferences the deponent had always been, and still was, under solemn promise not to reveal: that, ultimately, and after Wilson had again appeared before the magistrate, through the assistance rendered to him by the deponent, and with the aid of the counsel on both sides, the prosecution was withdrawn, and Wilson discharged from custody, and a compromise was effected, by which the parents of the child agreed to forego all actions for damages against Wilson in respect of the alleged assault; that Wilson afterwards expressed himself satisfied with what had been done, and the account between him and the deponent was agreed to be finally closed; that, at the request of Wilson, the deponent kept no record or memorandum of the transaction, nor was any entry made or account kept by him respecting the same; and that the deponent had not the means of making out or rendering to Wilson any bill of costs or account in respect of the said business or of the said sum of 200*l*.

He submitted, that, after so great a lapse of time, and it being expressly sworn by Vann that the money deposited with him had been expended for the purpose for which it was given to him, it was unreasonable to call upon him to deliver a bill.

JERVIS, C. J. An attorney ought not to take advantage

1854.

In re
VANN.

1854.

In re
VANN.

of the difficult position in which his client is placed, to extort from him such a bargain as this. I think Mr. Vann ought to furnish, not a technical bill of costs, but such a general account of the money he has expended on behalf of Wilson, as the master may think that under the peculiar circumstances he ought to give. The attorney, one would expect, would be glad of an opportunity to explain such a transaction. Let the whole matter go to the master, and let him dispose of it.

The rest of the court concurring, and the parties consenting, the rule was referred to the master, who, in the result, was so far satisfied with the account given by Mr. Vann, that he directed the rule to be discharged; but he declined to allow Mr. Vann his costs.

Rule discharged accordingly.

GRIFFITHS v. TEETGEN.

Nov. 4.

A. agreed with B. to permit his (B.'s) daughter (who was then residing with him as part of his family) to enter his (A.'s) service, to assist in his business during a temporary absence of his wife:—Held, that B. might maintain an action for her seduction by A. during that period.

THIS was an action against the defendant for the seduction of the plaintiff's daughter. The declaration was in the usual form, alleging that the daughter was the servant of the plaintiff, and that the plaintiff had by means of the seduction lost and been deprived of the services of his said daughter and servant.

The defendant pleaded,—first, not guilty,—secondly, that the daughter was not the plaintiff's servant, in manner and form as alleged. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff's daughter, who was about twenty-six years of age, had formerly lived in the service of the defendant, who kept a toy-shop, receiving wages at the rate of 10*l.* a year;

but had returned to her father's house, and resided with him as a member of his family. The defendant's wife having gone out of town for a short time, and the defendant being in want of somebody to attend to his shop in her absence, he applied to the parents of the girl to permit her to stay with him until his wife's return, probably for a week. She was to be paid for her services; but no distinct arrangement was made as to the rate of remuneration: and, when she left, after having been at the defendant's house about a fortnight,—during which time the defendant debauched her,—Mrs. Teetgen gave her 8s., and asked her if she was satisfied. She then returned to her father's house, where she remained until she found herself with child, when her father turned her out, but ultimately received her back, and she was in due time delivered of a child at her father's house.

On the part of the defendant, it was submitted that the plaintiff was not entitled to recover, inasmuch as the daughter was not his servant, but the servant of the defendant, at the time of the alleged seduction, and consequently that the foundation of the action failed.

The jury, under the direction of the Lord Chief Justice, returned a verdict for the plaintiff, with 25*l.* damages; and leave was reserved to the defendant to move to enter a verdict for him on the second issue, if the court should be of opinion that the objection taken at the trial was well founded.

Prentice now moved accordingly. This sort of action is only maintainable at the suit of the father in respect of services due and actually rendered to him by the daughter at the time the cause of action arises. Now, here, the evidence clearly shewed, that, at the time of the seduction, the daughter was the hired servant of *the defendant*. [*Maule, J.* The girl was living with her father and mother: she was her father's servant. She

1854.

 GRIFFITHS
v.
TEETGEN.

1854.

GRIFFITHS
v.
TRETGEN.

was invited to go to the defendant's house for a temporary purpose. And she afterwards returns to her father's house, and resides there as before.] It was expressly decided in *Blaymire v. Haley*, 6 M. & W. 55, that an action cannot be maintained by a father for the seduction of his daughter while she is in the domestic service of another person, although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father's when she quitted her service, unless she should go into another service. And Parke, B., says: "Here, the girl was in the actual service of another person, and her intention was, not to return at any definite time to her father's house, but only on her dismissal from her service, and in the uncertain event of her not going into another service. That an action for seduction will not lie under such circumstances, has been expressly decided in *Dean v. Peel*, 5 East, 45. In order to sustain this action, there must be *damnum et injuria*. The plaintiff not having shewn any right to the services of his daughter at the time of the seduction, there is here *damnum absque injuriâ*." [*Jervis, C. J.* What is there more in this case than going to a friend's house for a short period? My Brother Parke, in the case you rely on, adds,—“A mere temporary absence undoubtedly would not be sufficient to defeat the action; but that is very different from a continued and regular service.” *Maule, J.* The girl did not hire herself. The father (or the mother) agreed to lend the defendant his servant for a short time,—till his wife returned from the country.] If she was a hired servant of the defendant, the length of hiring was of no importance. The question is, whether this defendant could not have maintained an action if a third person had seduced the girl.

JERVIS, C. J. My impression of the evidence was,

and is, that the plaintiff's daughter was staying at the defendant's house rather in the character of a visitor than in that of a servant. The 8s. which was given to her by the defendant's wife when she left, was rather by way of gratuity than as payment of wages.

1854.

 GRIFFITHS
 v.
 TEETGEN.

MAULE, J. I see nothing in the position which the daughter held whilst residing at the defendant's house, which should at all interfere with the relation of servant to her father. It seems to me that there was ample evidence of service to entitle the plaintiff to maintain the action.

CROWDER, J. I am entirely of the same opinion. At the time of her seduction by the defendant, this young person was only temporarily absent from her father's roof. She still continued to form essentially a part of his family. The case very nearly resembles that of *Speight v. Oliveira*, 2 Stark. N. P. C. 493, where A. having, with intent to seduce the servant and daughter of B, hired her as his servant, and by that means obtained possession of her person,—it was held, that B. might maintain an action against him for such seduction. Abbott, C J., there says: "During the time that the girl was in her father's house, she was his servant: was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house, at 7s. per week. But, if he did not really hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them." I agree with the rest of the court in thinking that there should be no rule.

Rule refused.

1854.

CUMBERLAND v. BOWES.

Nov. 6.

A. held a farm of B., subject, amongst others, to the following covenants contained in a draft lease under which a former tenant had held,—

1. to house the produce on the farm, and to thresh, feed, and fodder the same thereon, and not to sell or dispose of any part thereof, *except as after mentioned*,—

2. that A. should be at liberty to sell hay and wheat straw (except that of the last year's produce), bringing back for every load of hay or straw two loads of manure,—

3. that A.

should, on the determination of the tenancy, leave all the hay, straw, and manure arising during the last year of his tenancy for the use of B. or of the incoming tenant, being paid for the hay and wheat straw at a *fair valuation*,—these latter words "*fair valuation*" having been substituted in the draft lease for "*consuming price*."

In an action by A. against B. to recover the value of hay and wheat straw left by the former at the expiration of his tenancy, it appeared that a valuation had been made by an umpire, who was the only witness called at the trial, and who stated that he had valued, not at a "*consuming price*," nor a "*market price*," but at a "*fair valuation*;" and the jury returned a verdict in accordance with his valuation:—

Held, that there was nothing from which the court could see that the valuation had been made upon an erroneous principle; and, what was a "*fair valuation*," being a question for the jury, there was no ground for interfering with the verdict.

Whether the court could properly notice the substitution of the words "*fair valuation*" for "*consuming price*," in the draft lease,—*quære?*

Held, also, that the valuation of the umpire was not invalidated by the circumstance of his having altered it after he had delivered it out, by striking out an item which ought not to have been included therein.

THIS was an action by an outgoing tenant of a farm called Bury Farm, at Walden, in the county of Hertford against his landlady, to recover compensation for certain hay, straw, and manure left by him on the farm. The defendant pleaded,—first, that the umpire did not duly value,—secondly, payment into court of 520*l*.

The cause was tried before Lord Chief Baron Pollock at the last assizes at Hertford, when the following facts were proved, or admitted:—The plaintiff's father, William Cumberland, in February, 1840, became tenant of the farm in question under a proposal for a lease in the terms contained in the draft lease hereinafter mentioned, and continued in possession thereof upon the terms of such draft lease until his death; and, after his death, his widow and the plaintiff, as his executrix and executor, continued to hold the farm upon the same terms as William Cumberland had held it, until the death of the widow; and, from that time, the plaintiff alone continued to hold down to March, 1852, when a new agreement was entered into under which the plaintiff became tenant

from year to year upon the same terms in all respects, save the substitution of a corn rent for a money rent.

The draft lease above referred to was as follows:—

Draft of an indenture of lease of the — of —, 1840, between Demster Heming and John Warwick, of the first part, the Right Hon. Thomas Bowes, Earl of Strathmore, of the second part, The Hon. Charlotte Lyon Bowes, commonly called Lady Glamis, widow, of the third part, and William Cumberland, of the fourth part. Demise of the farm and premises in question to William Cumberland, his executors &c., “from the 29th of September then next for four years thence next ensuing, and fully to be complete and ended, and thence from year to year, as yearly tenant thereof, until such tenancy shall be determined as after provided.” The draft contained, amongst others, the following covenants:—“And also that he, the said W. Cumberland, his executors or administrators, shall and will manage and cultivate the said farm and land (except the pasture lands) according to the rotation of crops and in manner usual in the four-course system, so that no more than two white straw crops, such as wheat, barley, or oats, shall in any case succeed each other, but shall have a green or pulse crop or a fallow constantly intervene, and so that the arable lands shall have a summer-fallow every fourth year; nor shall more than one wheat crop be taken off the same lands in one course of four years: And also shall and will in each year make and continue fallow at least one fourth part of the said arable lands as and for a summer-fallow; and shall and will in a proper and husbandlike way plough and dress the same, at the rate of ten loads per acre of good rotten dung, or equivalent manure: and shall and will in the last year of this demise leave the one fourth part of the said arable lands which shall be in course for fallow for wheat, and shall and will permit and suffer the said D. Heming and John Barker,

1854.

CUMBERLAND
v.
BOWES,

1854.
CUMBERLAND
v.
BOWES.

Covenant to
house the pro-
duce on the
premises.

*These words
were in substi-
tution of the
words, "wheat,
straw, and hay
(except that of
the last year's
produce), only
excepted."

or other the person or persons for the time being entitled as aforesaid, and their or his servants or workmen, or incoming tenant, in the last year of this demise, to enter the said lands so to be left for a summer fallow, to prepare the same in such manner as to them or him shall seem meet: And also shall and will house, inbarn, and set up upon the said demised premises all the corn, hay, and produce which shall grow or arise from the said demised lands and grounds, or any of them, and there thresh, feed, and fodder out the same for the better increase and making of dung and compost there, and in a husbandlike manner spread, bestow, and and lay all the dung, muck, stover, manure, soil, and compost that shall arise and be made upon the said premises, or any part thereof, during the continuance of his tenancy, in and upon the lands and grounds hereby demised, or some of them, where most needed, and shall not nor will sell or otherwise dispose of the same, or any part thereof, *except as after mentioned*.* And it is agreed that the said W. Cumberland, his executors or administrators, are to be at liberty to sell and dispose of his hay and wheat straw (except that of the last year's produce) on the terms that he or they do immediately afterwards bring back and return upon the said premises, for every load of hay or straw sold or disposed of, two loads of good rotten dung or other equivalent manure, and spread and bestow the same in a husbandlike manner upon the said demised lands where most needed: And also shall and will, on the determination of his tenancy, leave on the said hereby demised premises all the hay, wheat straw, and all other straw, as shall not be used in fodder, arising from the last year's crop, and also all the dung, muck, stover, and compost as shall arise or be made upon the said premises in the last year of his tenancy, to and for the use of the said D. Heming and John Barker, their heirs or assigns, or other the person

for the time being entitled as aforesaid, or his or their succeeding or incoming tenant, being paid or allowed for the hay and wheat straw at a *fair valuation* :* And also that it shall and may be lawful to and for the said D. Heming and John Barker, their heirs or assigns, or other the person for the time being entitled as aforesaid, or his or their succeeding or incoming tenant, and his and their servants and workmen, with horses and carts, in the last year of the tenancy hereby created, to enter into and upon so much of the said arable lands as shall then be in course for a summer fallow, and to plough, fallow, and manure the same in such manner as to them or him shall seem meet; and also to enter upon the dung, manure, and compost that shall then be in the yards and other parts of the said premises, and to take, carry out, and use the same in the said arable lands which shall then be in course for a summer fallow as aforesaid; And also that the said D. Heming and John Barker, or other person entitled as aforesaid, or their or his tenant, shall be at liberty, in the last year of his tenancy, to sow grass-seeds on such of the said arable lands as shall then be sowed with lent or spring corn, and the said W. Cumberland, his executors or administrators, shall and will harrow the same in gratis, and preserve the same from harm or being fed off." The draft further contained all the covenants usual in a farming lease.

Upon the plaintiff's giving up the farm, at Michaelmas, 1853, a dispute arose between him and the defendant as to the valuation of the hay and straw left by him; the plaintiff insisting that he was entitled to be paid for them at a "fair valuation," as contradistinguished from a "consuming price," which the defendant contended for. Valuers were accordingly appointed on each side. They not agreeing, an umpire was appointed, who valued the hay, straw, &c., left on the premises, at the sum of

1854.

CUMBERLAND

v.

BOWES.

*These words were in substitution of the words "consuming price."

1854. 774*l.* 11*s.* 3*d.*, accompanying his valuation with the following certificate,—“I certify that I have valued the above at a marketable price in its present situation.”

CUMBERLAND
v.
BOWES.

Eve, the umpire, who was the only witness called at the trial, stated that he did not value at a “consuming price,” or at a “market price,” but at a “fair valuation.”

It further appeared, that, after Eve had delivered out his valuation to the parties, he discovered that he had made a mistake, by including in his valuation a small quantity of old hay which he ought not to have valued and accordingly he altered the valuation by striking off 2*l.* as the value of the hay so improperly included.

The jury having returned a verdict for the plaintiff for 252*l.* 11*s.* 3*d.*, the difference between the sum paid into court, and the amount of the valuation as altered,

Channell, Serjt., on a former day in this term, pursuant to leave reserved to him for that purpose, moved to enter a nonsuit, or for a new trial. By the terms of the covenant, the tenant was bound to consume on the farm all the hay and straw, or, if any were carried off, to bring back an equivalent in manure. But, in the last year of the tenancy, he bound himself to leave the hay and straw at a *fair valuation*,—that is, regard being had to the other covenants, to be consumed on the farm by the incoming tenant. [*Jervis*, C. J. The universal rule is, that the tenant is to leave the hay and straw at a fodder price. Unless that is controlled by the word here substituted, it means a consuming price. *Mauld* J. The substitution of “fair valuation” for “consuming price,” would seem to shew that something different was intended.] The next objection is, that there was no such valuation here as to entitle the plaintiff to recover. The valuation delivered out by the umpire did not pursue his authority: and, though he afterward

altered his valuation for the purpose of curing the defect, he was then functus officio. [*Maule, J.* The umpire was not functus: he had not valued at all until he gave out the perfect valuation. If a man does not communicate the value of a specific thing which he is employed to value, he does not value it.] That would cure every objection in the case of an award which is bad for excess. [*Maule, J.* Not so. The award is bad, not because the arbitrator has exceeded his authority, but because he has not done that which the parties had required him to do.] A rule nisi having been granted on the first point only,

1854.

CUMBERLAND

v.
BOWES.

Lush, on a subsequent day, shewed cause. The umpire had the draft lease shewn to him, and he stated that he valued neither at a consuming price nor a market price, but at a fair valuation as between outgoing and incoming tenant. The fact of the words "fair valuation" having been substituted for "consuming price," shews that the parties contemplated something more than was meant by the clause as it originally stood. There was no evidence that the valuation was not a fair one.

Channell, Serjt., and *Rodwell*, in support of the rule. The words "at a fair valuation" must be construed with reference to the precedent matter in the lease. There are three covenants which it is essential to look at. By the first of these, the tenant binds himself to "house, inbarn, and set up upon the demised premises all the corn, hay, and produce which shall grow or arise from the said demised lands and grounds, and there thresh, feed, and fodder out the same for the better increase and making of dung and compost there, and in a husbandlike manner spread, bestow, and lay all the dung, muck, &c., that shall arise and be made upon the

1854.

CUMBERLAND

v.
BOWEN.

said premises during the continuance of his tenancy, in and upon the lands and grounds thereby demised, and shall not nor will sell or otherwise dispose of the same, or any part thereof, *except as after mentioned.*" That, of itself, would give the tenant no right to carry off hay or straw. The next covenant is,—“And it is agreed that the said W. Cumberland, his executors or administrators, are to be at liberty to sell and dispose of his hay and wheat straw (*except that of the last year's produce*) on the terms that he or they do immediately afterwards bring back and return upon the said premises, for every load of hay or straw sold or disposed of, two loads of good rotten dung,” &c. That covenant expressly excludes the tenant's right to carry away or sell hay or straw during the last year of the tenancy. Then comes the third covenant, upon which the question more immediately arises,—“And also shall and will, on the determination of his tenancy, leave on the said hereby demised premises all the hay, wheat straw, and all other straw, as shall not be used in fodder, arising from the last year's crop, and also all the dung, &c., as shall arise or be made upon the said premises in the last year of his tenancy, to and for the use of the landlord, or the succeeding or incoming tenant, being paid or allowed for the hay and wheat straw at a *fair valuation.*” Looking at these three covenants, it is manifest that the words “fair valuation,” taken with reference to the obligations of the tenant, mean, a fair valuation at a consuming price. That the umpire here has failed to value upon that principle, is plain, both from his certificate and from his evidence. In the former, he says he has valued the hay and straw “at a marketable price in its present situation.” He had evidently forgotten the position of landlord and tenant, and had entirely overlooked the obligations of the covenants. Then, on his examination at the trial, he said he did not value at a

"consuming price," or at a "market price," but at a "fair valuation:" whereas, by the true construction of the covenants, it is submitted he was *bound* to value at a consuming price.

1854.
CUMBERLAND
v.
BOWES.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

This was an action by an outgoing tenant against his landlady, to recover the value of certain hay and straw left by him for the incoming tenant, on quitting a farm: and the contention between the parties, was, upon what principle the valuation ought to be made. It appears that the plaintiff's father had formerly held the farm under certain terms mentioned in a draft lease, the material covenants of which were,—first, to house upon the demised premises all the hay and produce of the farm, and thresh, feed, and fodder the same thereon, and not to sell or dispose of any part thereof, except as after mentioned,—secondly, that the tenant should be at liberty to sell hay and wheat straw (*except that of the last year's produce*), he bringing back for every load of hay or straw, two loads of manure,—thirdly, that, on the determination of the tenancy, the tenant should leave all the hay, straw, and manure arising during the last year of his tenancy, for the use of the landlady or the incoming tenant, being paid for the hay and wheat straw *at a fair valuation*; these latter words having been substituted in the draft lease, for the words "at a consuming price." At the trial, the plaintiff claimed to have the hay and straw valued at "a fair valuation," without regard to a consuming value: the defendant, on the other hand, insisted, that, regard being had to the covenants, the valuation was to be at a "consuming price." The Lord Chief Baron was inclined to think that the plaintiff's construction was the correct one;

1854.

CUMBERLAND

v.
BOWEN.

and the plaintiff had a verdict. In the course of the discussion before us on the motion to enter a nonsuit, it was very ingeniously urged by my Brother Channell, that, whatever might be the effect of the alteration in the draft lease, the tenant was only entitled to be paid at a consuming price. His argument was in substance this,—There are three covenants bearing on the subject. By the first, the tenant is bound to consume all the produce upon the farm. The second, which was in the tenant's ease, entitled him to sell hay and straw on condition of his bringing back two loads for one of manure,—the last year of the tenancy being excluded. The third compelled him to leave all the last year's hay and straw, &c., the tenant being paid for the hay and wheat straw *at a fair valuation*. As, therefore, the tenant was bound to consume all the hay and straw on the farm under the first covenant, and could not carry away hay and straw at all during the term, except under the second covenant, and then only to the exclusion of the last year's produce, my Brother Channell insisted that the last year's produce, regard being had to the tenant's obligations under the first and second covenants, must be paid for at a *consuming price*, notwithstanding the substitution of the words "at a fair valuation." On the other hand, Mr. Lush insisted that he might look at the draft lease, and, finding the words "fair valuation" to have been substituted for "consuming price," which stood there before, he might reasonably call upon the court to hold that the parties intended by "fair valuation" something different from "consuming price." If it were necessary to determine whether or not we could look at the alteration in the draft, as a key to the meaning of the parties, I must confess I should have felt considerable doubt. It might be letting in contradictory parol evidence to shew the circumstances under which the alteration was made. But we are all of

opinion, that, for the purposes of this rule, it will not be necessary to take that matter into our consideration at all; for, looking at the three covenants to which our attention has been invited, the plaintiff is bound to leave the hay and straw of the last year's produce on the farm, to be paid for at a fair valuation. Even in that view, the plaintiff is entitled to keep the verdict. Whether and what is a fair valuation, is a question for the jury; and, the only witness who was called at the trial having stated that the valuation here made was a fair valuation, I see no reason for being dissatisfied with the verdict. The rule, therefore will be discharged.

1854.

CUMBERLAND

v.
BOWES.

Rule discharged.

JOHNSON v. HARRIS.

Nov. 24.

THE defendant had given a warrant of attorney, in 1842, for 500*l.*, to secure to the plaintiff an annuity of 32*l.*, by half-yearly payments. He afterwards petitioned the insolvent debtors court; and, after his discharge, a half-yearly instalment of the annuity becoming due, judgment was signed on the warrant of attorney, and a *ca. sa.* issued for 16*l.*, under which he was taken in execution.

Application was made to Cresswell, J., at Chambers, for his discharge from custody, under the 7 & 8 Vict. c. 96, ss. 25, 57; but that learned judge dismissed the summons, and the defendant was remanded to prison.

By the 7 & 8 Vict. c. 96, s. 25, sums payable by way of annuity are to be deemed *debts*: and by s. 57,—reciting “that it is expedient to limit the present power of arrest upon final process,” it is enacted “that no person shall be taken or charged in execution upon any judgment obtained in any

action for the recovery of any debt, wherein *the sum recovered* shall not exceed 20*l.*, exclusive of the costs recovered by such judgment.”

A. signed judgment for 500*l.* on a warrant of attorney given by B. to secure an annuity of 32*l.* by half-yearly payments, and took B. in execution:—Held,—*dubitante Williams, J.*,—that B. was entitled to be discharged from custody under the above act, the “sum recovered” by the action being 16*l.*

1854.

JOHNSON
v.
HARRIS.

Rowley, on a former day in this term, obtained a rule nisi to rescind the order of Cresswell, J., to set aside the subsequent proceedings, and to discharge the defendant. He referred to the statute, and to the case of *Harris v. Parker*, 3 Dowl. P. C. 451, where, in debt, the judgment was for 100*l.*, and the execution for 18*l.* 10*s.* only, which was alleged to be the real debt: and Parke, B., held the defendant entitled to be discharged from custody,—under the 48 G. 3, c. 123.

Byles, Serjt., now shewed cause. The defendant is not entitled to be discharged from custody under the 48 G. 3, c. 123, s. 1, which applies to parties in execution for any “debt or damages,” not exceeding 20*l.*, exclusive of costs. It can only be under the 7 & 8 Vict. c. 96, ss. 25, 57, that he can be discharged, if at all. The 25th section enacts that every sum of money which shall be payable, by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, shall be deemed and taken to be *debts* within the meaning of the act. And s. 57, reciting “that it is expedient to limit the present power of arrest upon final process,” enacts “that no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty’s superior courts, or in any county-court, court of requests, or other inferior court, in any action for the recovery of any debt, wherein the *sum recovered* shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment.” Here, the sum recovered by the judgment is 500*l.* That judgment stands as a security for the instalments. The case, therefore, is not within either the words or the spirit of the act. In *Harris v. Parker*, the judgment substantially was for 18*l.* 10*s.* only. [*Maule*, J. The object of this provision, is, to restrain the executions of creditors against the persons

of their debtors. The sum "recovered" here, if paid, would be 16*l.* only. Ought we, looking at the spirit of the act, to permit a creditor to incarcerate his debtor for a sum of 16*l.*?] Upon that construction of the act, whatever may be the amount for which judgment is signed, the defendant will be entitled to his discharge if he is in execution for less than 20*l.* [*Williams, J.* The latter words of the clause,—“Exclusive of the costs recovered by such judgment,”—seem to tie it to the *judgment*.] Upon a judgment for 500*l.*, the plaintiff has his debtor in execution for 16*l.* Has he recovered 16*l.*? [*Williams, J.* I am far from satisfied that my Brother Maule's construction is the true one. *Jervis, C. J.* Suppose the defendant pays the 16*l.*, what has the plaintiff recovered in the action?] In one sense, no doubt, he would have recovered 16*l.* only. But, in truth he has by the judgment recovered 500*l.* He would need no new judgment to entitle him to issue execution for any future instalment of the annuity.

1854.

JOHNSON
v.
HARRIS.

JERVIS, C. J. The words of the 7 & 8 Vict. c. 96, s. 57, are susceptible of two meanings. The sum *recovered* by the judgment in this case technically no doubt is 500*l.* But nobody out of court would say that this defendant is in custody for a sum recovered exceeding 20*l.* The defendant may purchase his liberty for 16*l.* I think he is entitled to his discharge.

MAULE, J. I also think, that, in the sense meant by the legislature, the plaintiff here has recovered 16*l.* only, and not 500*l.* The spirit and the intention of the act are very evident; and the words are capable of a construction which will carry them into effect. And I think, that, in favour of the liberty of the subject, we ought to give the words of the act a large and liberal construction so as to effectuate the intention of its framers.

1854.

JOHNSON
v.
HARRIS.

WILLIAMS, J. I should have great difficulty in arriving at the construction which my Lord and my Brother Maule have put upon the statute; though I do not, under the circumstances of this case, regret that my learned Brothers have come to such a conclusion.

CROWDER, J. I also have entertained some doubt as to the true construction of the 57th section. But, looking at the intention of that provision, I incline to think that the conclusion arrived at by my Lord and my Brother Maule may be supported. The section speaks of "any action for the recovery of any debt." This action was really brought to recover 16*l*.

Rule absolute.

Nov. 4.

BABONNEAU v. FARRELL.

In slander, the declaration stated, that the plaintiff was engaged in the trade of a manufacturer of asphalte, and had been employed by the board of ordnance to relay the entrance of their office with new asphalte, and had duly performed the work; and that the defendant spoke of and

THIS was an action of slander. The declaration stated, that the plaintiff was engaged in the trade of a manufacturer of asphalte, under the name and style of Babonneau & Co.; and that, shortly before the committing of the grievance complained of, he had been employed by the board of ordnance to relay the entrance of the Ordnance Office with new asphalte, and had duly performed the work: yet that the defendant, well knowing the premises, and intending to injure the plaintiff, falsely spoke and published of and concerning the plaintiff in his said trade and business, and of and concerning the concerning the plaintiff in his said trade, and of and concerning the plaintiff in reference to the said work, the false and defamatory words following:—"The old materials have been re-laid by your company in the asphalte work executed in front of the Ordnance Office; and I have seen the work done,"—innuendo, "that the plaintiff had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte materials which had before been used at the entrance of the said Ordnance Office, instead of new asphalte, according to his said contract:"—Held, that the declaration was sufficient, and the innuendo not too large.

plaintiff in reference to his said work, in the presence of John Smith, an agent of the plaintiff, and others, the false and defamatory words following, that is to say, "The old materials have been re-laid by your (meaning the plaintiff's) company in the asphalte work executed in front of the Ordnance Office, Pall Mall (meaning the said work so executed by the plaintiff for the board of ordnance as aforesaid), and I (meaning the plaintiff) have seen the work done (thereby meaning that the plaintiff had been guilty of dishonesty in the conduct of his said trade and business, by laying down again the old asphalte materials which had before been used at the entrance of the said Ordnance Office, instead of new asphalte according to his said contract):" by means of the speaking and publishing of which said words, the plaintiff had been greatly injured in his said trade and business, &c.

1854.

BABONNEAU
v.
FARRELL.

Plea,—not guilty; whereupon issue was tried.

At the trial, before Jervis, C. J., at the sittings in London after last term, the plaintiff's contract with the board of ordnance, and the due performance thereof by him were proved, as also was the speaking of the words by the defendant, as alleged in the declaration. His Lordship merely left it to the jury to say whether the words were proved, and the jury returned a verdict for the plaintiff, with 40s. damages.

J. H. Hodgson now moved for a new trial, on the ground of misdirection. The words charged not being actionable in themselves, the Lord Chief Justice should have told the jury that the defendant was not liable unless it was proved that he knew the nature of the contract between the plaintiff and the Ordnance Office. He should have asked the jury, not only whether the defendant spoke the words, but whether he spoke them in the sense imputed to them in the declaration. [*Maule*,

1854.

BABONNEAU
v.
FARRELL.

J. The innuendo imputes an intention to the speaker in using them. The plaintiff was bound to prove, and it is not suggested that he did not prove, that the words were spoken on an occasion and under circumstances which satisfied the jury that the defendant meant to impute to the plaintiff that which the innuendo conveys.] The innuendo gives the words a larger meaning than they naturally bear. [Crowder, J. The meaning imputed to the words by the innuendo, is no more than the natural inference.]

Per Curiam. There is no ground for a rule. The innuendo does not enlarge the sense of the slanderous words, but merely shews the intention of the speaker.

Rule refused.

Nov. 24.

GITTINS v. SYMES.

The rule for a writ of injunction,—as, to restrain a defendant from infringing a patent,—under the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 82, is a rule to shew cause only, in the first instance.

The same relief may be had under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42.

THE 82nd section of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125,—enacts “that it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after the judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from a repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and, in case of disobedience, such writ may be enforced by attachment by the court, or, when such court shall not be sitting, by a judge: provided always

that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order."

1854.

 GITTINS
v.
SYMES.

An action having been brought against the defendant for the infringement of a patent obtained by the plaintiff for an improved money-till, on the 7th of January, 1853,

Miller, Serjt., upon an affidavit that the plaintiff was the true and first inventor of the patent till, that the defendant had infringed his patent, and that due notice of the motion had been given, applied for a writ of injunction, under the above statute, to restrain the defendant from further infringing the patent right. [*Jervis*, C. J. This might more conveniently be done under the Patent Law Amendment Act, 1852,—15 & 16 Vict. c. 83,—s. 42. (a)] It may also be done under the Common Law Procedure Act. [*Maule*, J. Is the plaintiff in such a position that he might have obtained an injunction in Chancery?] He is.

JERVIS, C. J. The practice in equity, is, to direct an action at law to try the right, and that an account be taken in the mean time, and to grant an interlocutory injunction until the cause is determined. We must do

(a) Which enacts, that, "in any action in any of Her Majesty's superior courts of record at Westminster and in Dublin for the infringement of letters-patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or, if the court be not sitting, then for the judge of such court, on the application

of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit."

1854. here as nearly as possible as the court of equity would do. A rule nisi may go, and we may mould it on cause being shewn.

GITTINS
v.
SYMES.

Miller, Serjt., on a subsequent day, prayed that the rule might be drawn up to shew cause at Chambers.

JERVIS, C. J. This being the first motion upon the subject, and the rule not having yet been promulgated in any of the courts, it would hardly be right to send it to a judge at Chambers to settle the practice.

Rule nisi accordingly. (a)

(a) Nothing further was heard of the matter.

In the Matter of ELIZABETH, the Wife of ———

LEGGE.

Nov. 21.

The court allowed a commission for taking the acknowledgment of a married woman in Australia under the 3 & 4 W. 4, c. 74, s. 83, to go out with a blank for the Christian name of the husband, which (the marriage having taken place there) was unknown here.

BREWER moved that a commission might go to Australia to take the acknowledgment of a married woman there, a blank being left therein for the Christian name of the husband. It appeared by affidavit that the lady had married there a person named Legge, but that there was no person to be found in this country who knew his Christian name. He referred to *In re Apperton*, antè, Vol. I, p. 447, where the court allowed a commission to go to Sydney with a blank for the Christian name of the lady, under precisely similar circumstances.

Per Curiam. *In re Apperton* is a stronger case than this. Let the commission go.

Fiat.

1854.

IN THE EXCHEQUER CHAMBER.

DALBY v. THE INDIA AND LONDON LIFE-ASSURANCE
COMPANY.

Dec. 2.

THIS was an action upon a policy of assurance effected by the plaintiff, on the 9th of January, 1847, for and on behalf of the directors of the Anchor Life-Assurance Company, in the sum of 1000*l.*, on the life of His Royal Highness, Adolphus Frederick, Duke of Cambridge, for the whole term of such life, in consideration of the sum of 122*l.* 15*s.* 10*d.*, and an undertaking to pay the like sum yearly during the life of the duke.

The declaration, after setting out the policy, which was subject to the following, amongst other, conditions, "The funds or property of the company for the time being remaining unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the powers, trusts, and authorities of the company's deed of settlement, and of the provisions of the 7 & 8 Vict. c. 110, shall alone be answerable for any claims under the policy,"—averred, that the said Adolphus Frederick, Duke of Cambridge, lived beyond the said first period of twelve calendar months, and until a certain day, to wit, the 8th of July, 1850, when the said Adolphus Frederick, Duke of Cambridge, died; and that, during the life of the said Adolphus Frederick, Duke of Cambridge, and at the expiration of the said last-mentioned period, and of each and every subsequent period of twelve calendar months during the life of the said Adolphus Frederick, Duke of Cambridge, he, the plaintiff, for and on behalf of the Anchor Life-Assurance Company as aforesaid, did pay to the said first-mentioned company the further sum or

The contract of life-assurance is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of certain annual premiums during his life. It is not a contract of indemnity.

Where a policy effected by a creditor on the life of his debtor, is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death does not invalidate it, by reason of the provisions of the 14 G. 3, c. 48. *Godsall v. Boldero*, 9 East, 72, overruled.

1854.
DABBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

premium of 122*l.* 15*s.* 10*d.* for and in respect of the then next succeeding period of twelve calendar months; and the said policy remained and was in force, to wit, from the making thereof until and at the time of the death of the said Adolphus Frederick, Duke of Cambridge: That afterwards, and after the death of the said Adolphus Frederick, Duke of Cambridge, to wit, on the 28th of November, 1850, the death of the said Adolphus Frederick, Duke of Cambridge, was duly notified by the plaintiff to the directors of the said company, and proof thereof then made to the satisfaction of the directors of the said company: That everything averred by him, the plaintiff, in the said declaration or statement in the said policy of assurance recited and mentioned, was true: *That, at the time of the making of the said policy, and thence until the death of the said Adolphus Frederick, Duke of Cambridge, the Anchor Life-Assurance Company aforesaid was interested in the life of the said Adolphus Frederick, Duke of Cambridge, to the amount so insured thereon as aforesaid:* That the plaintiff and the Anchor Life-Assurance Company had respectively complied with, observed, and performed all things in the said policy and conditions contained on his and their part and behalf to be complied with and observed and performed, according to the form and effect of the said policy of assurance: That, although three calendar months since the making of such proof as aforesaid of the death of the said Adolphus Frederick, Duke of Cambridge, had long since elapsed, and the funds and property of the India and London Life-Assurance Company aforesaid remaining unapplied and undisposed of, and inapplicable to prior claims and demands, according to the form and effect, true intent, and meaning of the said policy, were at all times during, and at the expiration of, the said last-mentioned period of three calendar months, and had been from hence hitherto, and still were, sufficient and available for payment of the said sum of 1000*l.*, and

were subject and liable to pay the same to the plaintiff, according to the defendants' said deed of settlement,— of all which said premises the said company then had notice : Yet that the defendants (although often requested so to do) did not nor would, within three calendar months after such proof as aforesaid so made as aforesaid of the death of the said Adolphus Frederick, Duke of Cambridge, or at any time afterwards, pay to the plaintiff, or to the said Anchor Life-Assurance Company, the said sum of 1000*l.*, or any part thereof; but had hitherto wholly refused and neglected so to do, and had therein wholly failed and made default, contrary to the form and effect of the said instrument or policy of assurance, and of their said covenant by them in that behalf made as aforesaid, &c.

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

The defendants pleaded, that the said Anchor Life-Assurance Company was not interested in the life of the said Adolphus Frederick, Duke of Cambridge, in manner and form as the plaintiff had above thereof in the declaration in that behalf alleged. Issue thereon. Pleas.

The cause came on for trial before Cresswell, J., at the sittings in Middlesex after Michaelmas Term, 1851, when, a point being reserved for the opinion of the court of Common Pleas involving a question as to the propriety of the decision of the case of *Godsall v. Boldero*, 9 East, 72, it was, after several arguments, at the suggestion of that court, agreed that the facts should be stated for the opinion of the court of error in the shape of a bill of exceptions, which was accordingly done in substance as follows :—

Before the date of the policy in the declaration mentioned, certain persons calling themselves the Anchor Life-Assurance Company had granted to the Rev. John Wright four several policies of insurance on the life of the Duke of Cambridge, to the amount of 3000*l.* Three of these policies were dated the 18th of October,

Bill of exceptions.

1854.
 DALBY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

Surrender and
 cancellation of
 the four poli-
 cies.

1843, and one the 3rd of November, 1843,—two of them being for 1000*l.* each, and the other two for 500*l.* each. These four several sums of money were by the terms of the policies to be paid by the Anchor Life-Assurance Company to Wright on the death of the Duke. The Anchor Life-Assurance Company being desirous to secure and indemnify themselves, to the extent of 1000*l.*, against their liability for the 3000*l.* payable according to the last-mentioned policies to Wright on the death of the Duke, the plaintiff, as one of the members and directors of the said company, by the authority and on behalf of the said company, effected the policy in the declaration with the defendants for 1000*l.*, by way of a cross or counter assurance to that amount, on the life of the Duke, against the policies so effected by Wright with the Anchor Life-Assurance Company.

By a deed bearing date the 1st of December, 1848, in consideration of the surrender to them by Wright of the four policies above mentioned, and of the sum of 325*l.*, the directors of the Anchor Life-Assurance Company granted to Wright an annuity of 120*l.*, during the joint lives of himself and his then wife, and of 80*l.* for the life of the survivor. Upon the execution of this deed, the said four policies were delivered up by Wright to the company to be cancelled, and were cancelled accordingly. All the premiums which according to the terms of the said policies had become due previously to or at the time of the delivery up of the said policies, had been paid by Wright to the Anchor Life-Assurance Company.

At the respective times of effecting the said four several policies of assurance with the said Anchor Life-Assurance Company, William Calverly Curteis was a partner in, and one of the directors of, the said Anchor Life-Assurance Company, and remained and continued so until and at the time of the trial. After the execution and delivery of the deed last mentioned, and the

cancellation of the said four policies, the said policy of assurance in the declaration mentioned was given over to the said W. C. Curteis. All the premiums in respect of the policy in the declaration mentioned, paid after the same was so given over to the said W. C. Curteis as aforesaid, were paid by the plaintiff to the defendants with moneys received by him from the said W. C. Curteis for the purpose of paying such premiums, and being the proper moneys of the said W. C. Curteis, and not of the Anchor Life-Assurance Company. The plaintiff never communicated to the defendants that the policy in the declaration mentioned had been given over to the said W. C. Curteis, or that the premiums paid to them after the same had been so given over to him were paid with the moneys of the said W. C. Curteis: nor did the plaintiff ever communicate to the defendants that the several policies granted by the said Anchor Life-Assurance Company to Wright, had been so delivered up and cancelled, or that the said annuities had been so granted to Wright.

The defendants put in a bill in Chancery which had been filed by them against the now plaintiff and the Anchor Assurance Company on the 1st of April, 1851, and the answer thereto. In this answer, the plaintiff and the Anchor Assurance Company admitted, that the assurance effected by the policy of the 9th of January, 1847, was in the nature of what is commonly known by the name of a cross-assurance, and was effected by Dalby as agent of the Anchor Assurance Company, and on their behalf, for the purpose of securing them against a part of their liability for the 3000*l.* which they had become liable to pay on the policies on the life of the Duke of Cambridge granted by the said Anchor Life-Assurance Company to Wright; and that the premiums on the said policy of the 9th of January, 1847, were paid up to the time of the death of the Duke,

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

Defendants'
case.

1854.
DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

on the 8th of July, 1850. The answer further stated, that the said policies for 3000*l.* were effected by Wright with the Anchor Life-Assurance Company in the months of October and November, 1843; that the said Anchor Life-Assurance Company having subsequently passed a rule to limit the risk upon a single life to 2000*l.*, they, on the 9th of January, 1847, effected the said policy for 1000*l.* with the India and London Life-Assurance Company; that, up to the month of October, 1848, Wright had paid premiums upon the said policies for 3000*l.*, amounting together to 1350*l.*; that he agreed with the Anchor Assurance Company to surrender the said policies, and to pay the said company a sum of 325*l.*, in consideration that the said company would grant to him and his wife an annuity of 120*l.* during their joint lives, and 80*l.* a year during the life of the survivor; and accordingly the Anchor Assurance Company, in October, 1848, agreed to cancel, and did cancel, the said policies for 3000*l.*, and, in consideration thereof, and of the said sum of 325*l.*, granted to Wright and his wife an annuity to the amount and upon the terms aforesaid, and thenceforward became, and were then, liable for the same; that the said W. C. Curteis, who then was, and still remained, one of the directors of the said Anchor Assurance Company, being, as such director, liable for the payment of the said annuity, was desirous to continue the aforesaid policy for 1000*l.* with the India and London Life-Assurance Company; that the other directors of the Anchor Assurance Company agreed thereto, and handed over the said policy for 1000*l.* to him, and he, the said W. C. Curteis, by the hands of Dalby, thenceforward continued to pay the annual premium of 122*l.* 15*s.* 10*d.* upon the same policy to the said India and London Life-Assurance Company to the time of the death of the said Duke of Cambridge; that the payment of the said annuity of 120*l.* to Wright and his wife, and of 80*l.* to

the survivor, so granted as aforesaid in respect of the transactions upon the aforesaid several policies with the Anchor Assurance Company and the India and London Life-Assurance Company, was a liability continuing from the time of the grant of the said annuity to the time of the death of the said Duke of Cambridge, and the Anchor Assurance Company, and the said W. C. Curteis as one of the directors of the same company, were during the time aforesaid, and still remained, liable to the payment of the same annuity, and that he, the said W. C. Curteis, having taken upon himself the payment of the said premium of 122*l.* 15*s.* 10*d.* to the India and London Life-Assurance Company, was interested in the said policy for 1000*l.* effected with that company, to the extent and in the manner aforesaid; that, subsequently to the death of the said Duke of Cambridge, application for the payment of the said policy for 1000*l.* was made by Dalby, on behalf of the said W. C. Curteis, to the India and London Life-Assurance Company, and the company having objected to pay that sum, in February, 1851, an action was brought to recover it; that the said W. C. Curteis, in order to inform and satisfy the India and London Life-Assurance Company as to his interest in the said policy for 1000*l.*, on the 27th of May, 1851, wrote and sent a letter to the said company, as follows:—

“Doctors’ Commons, May 27, 1851.

“Gentlemen,—As you are determined to be informed of the exact circumstances relative to the policy of assurance in your office upon the life of His late Royal Highness, the Duke of Cambridge, I beg to acquaint you that I am the bonâ fide holder of that policy, and that I became possessed of it under the following circumstances:—Mr. Wright, who had assured the life of the late Duke for 3000*l.* with the Anchor Assurance Company, finding the payment of the premiums incon-

1854.

DALBY
OF
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.

 DALBY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

venient, requested the directors of that company to commute his claims which would arise upon the Duke's death, into an immediate annuity. This the company acceded to; and I, as a director of that company, am personally bound to pay that annuity. When the annuity was granted, some of the directors were of opinion that the policy for 1000*l.* in the India and London office should be discontinued: but I objected to that course, and stated, that, if the directors as a body declined to keep up the policy, if they would allow me, I would do so on my own account, and would give to the company whatever sum might be considered the value of the policy. The company upon this allowed me to do as I proposed: but, as the policy was of no great value, and was at the time partly my own, did not require me to pay anything for it. And so little did I think of the possibility of any question arising when the Duke's decease might occur, that I did not require a transfer to be made to me of the policy, nor even any memorandum of its being my property, until after I had paid the second premium; when I requested Mr. Dalby to write me a note stating the policy was mine; which note is now in my possession. Under these circumstances, gentlemen, I trust you will no longer delay paying the just claim, and thus put an end to all further dispute and litigation. The policy was originally in part my own; and I submit that I had subsequently a perfect right to keep it alive. I had in the first instance an insurable interest in his late Royal Highness's life; and that interest in effect is a continuing interest at this day, as I am bound to pay Mr. Wright's annuity, the consideration for which being the sum of 3000*l.* payable to him on the death of the Duke, whenever that might happen.

"Your very obedient servant,

"W. C. Curteis."

The answer further admitted that the policies granted by the Anchor Assurance Company to Wright were cancelled on the 18th of October, 1848, and denied that the policy for 1000*l.* had been kept up by Dalby as a private speculation of his own, or of himself jointly with any other person or persons other than the said Anchor Assurance Company, and not having any insurable interest in the life of the said Duke of Cambridge; but, admitting that Dalby had not and never had any insurable interest in the life of the said Duke, alleged that the said policy for 1000*l.* having been effected by and for the benefit of the said Anchor Assurance Company, and the said W. C. Curteis, as one of the directors of the said Anchor Assurance Company, having had such interest in the life of the Duke as aforesaid, and still having such interest as aforesaid in the said policy, and Dalby being the resident director of the said Anchor Assurance Company, it was submitted that he was the proper person in whose name proceedings should be taken to recover the amount due upon the said policy of 1000*l.*; and that the subsequent premiums were paid by the said W. C. Curteis, and the action brought on his behalf, &c.

The learned judge directed the jury, that, upon the facts so proved, the said Anchor Life-Assurance Company was not, and the members constituting the same company were not, and that there was no evidence that such company or members was or were, interested in the life of the said Adolphus Frederick, Duke of Cambridge, in manner and form as the plaintiff had thereof in the declaration in that behalf alleged: and thereupon the jury gave their verdict for the defendants. But the counsel on the part of the plaintiff, before the jury had pronounced their said verdict, excepted to the said direction of the said justice, and insisted, that, upon the facts so proved, the said Anchor Life-Assurance Company was, and that there was evidence that the said company were,

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

Direction to the
jury.

Exceptions.

1854.

 DALBY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

interested in the life of the said Duke, in manner and form as the plaintiff had thereof in the declaration in that behalf alleged, and that the said justice ought so to have directed the jury. And, inasmuch, &c.

The exceptions came on for argument in the Exchequer Chamber, on the 27th of November last, before Parke, B., Alderson, B., Wightman, J., Erle, J., Platt, B., and Crompton, J.

Bramwell (with whom were *H. Tindal Atkinson* and *F. J. Smith*), for the plaintiff. Life assurance is, in effect, a contrivance for accumulating. The contract which the assured enters into with the office, is, not a contract to make good any *loss* to the assured, but a simple and absolute contract to pay a given sum of money on the death of the life, in consideration of certain unvarying annual payments in the mean time. [*Alderson*, B. The case of *Godsall v. Boldero*, 9 East, 72, starts with the palpable fallacy, that it is a mere contract of indemnity. In the case of a fire or marine insurance, the office does not necessarily pay anything. Life-assurance is altogether different: every life must come to an end. In *Godsall v. Boldero*, it happened to be the contract of a creditor.] Life-policies bear no analogy whatever to fire or sea-policies. A life-policy increases in value as time progresses: not so a fire or a marine policy. The latter are strictly contracts of indemnity. At common law, wagering policies,—*Cousins v. Nantes*, 3 Taunt. 513,—or policies on the lives of persons in which the assured had no interest,—*Schwieger v. Magee*, 1 Cooke & Alcock (Irish), 182,—were valid. It was only by the 19 G. 2, c. 37, that the former were prohibited,—1 Arnould on Insurance, 277 (where the cases are collected),—and the latter by the 14 G. 3, c. 48,—*Goreham v. Sweeting*, 2 Saund. 200. Then, has the 14 G. 3, c. 48, made any difference which affects this case. It is submitted that the only effect is, that

the party entering into the contract shall have an interest in the life assured at the time the contract is entered into. The 14 G. 3, c. 48, is intituled "An act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured." The 1st section recites that "it hath been found by experience that the making insurances on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming;" and, for remedy thereof, enacts, "that, from and after the passing of this act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever." The 2nd section enacts "that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote." The 3rd section enacts "that, in all cases where the insured *hath* interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." And the 4th section excludes from the operation of the act insurances on ships, goods, or merchandises. [Parke, B. No doubt it was a valid contract at common law. It all depends on the 14 G. 3, c. 48.] If the contract was

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

valid at the time it was made, the statute does not avoid it. The fact of the debt being paid, and so the interest of the creditor in the life ceasing, ought not in reason or justice to deprive him of the premiums which he may have paid for a long series of years. Or, suppose the debtor dies leaving no available assets, and the office pay the sum insured upon his life by a creditor; that clearly does not discharge the *debt*: is the office entitled to demand the money back, if the debtor's executors,—say, ten years after his death,—become possessed of funds wherewith to pay the debt? That must be the result, if *Godsall v. Boldero* be sustained. In *Godsall v. Boldero*, the plaintiff, a creditor of Mr. Pitt, had insured his life in the Pelican Insurance Office for 500*l*. At the time of effecting the policy, and at the time of Mr. Pitt's death, he was indebted to the plaintiff in a sum exceeding 500*l*. After Mr. Pitt's death, his debts (and the plaintiff's, amongst others) were paid by a parliamentary grant. The plaintiff brought an action against the Pelican Office; and, in the argument of Dampier, the claim was rested, with one exception, upon the true footing. It was improperly conceded by him *that the interest of the assured must continue up to the time of the death of the debtor*. Marryat, on the other hand, argued that the contract was strictly and properly a contract of indemnity only. And in the reply it was correctly denied "that the subsequent payment of the debt out of the grant of parliament was like the case of salvage on a marine policy; for, that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the solvency of the debtor formed no basis of the calculation, but only the probable duration of his life." Lord Ellenborough, in delivering the judgment of the court, adopting the argument of the defendant, says: "This assurance, as every other to which the law gives effect (with the exceptions only

which are contained in the 2nd and 3rd sections of the statute 19 G. 2, c. 37), is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the statute 14 G. 3, c. 48, s. 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. The action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and, being so founded, it follows, of course, that, if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which this debt was paid did not (as was the case in the present instance) originally belong to the executors, as a part of the assets of the deceased: for, though it were derived to them aliunde, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord Mansfield, in *Hamilton v. Mendes*, 2

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.
 DABY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

Burr. 1210. The words of Lord Mansfield are,—‘The plaintiff’s demand is for an *indemnity*: his action, then, must be founded upon the nature of the *damnification*, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all.’ ‘Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for *indemnity*, where, upon the whole event, *no damage* has been sustained.’” The first part of the judgment assumes the whole question. And the only authority Lord Ellenborough quotes, is *Hamilton v. Mendes*, which was the case of a marine policy, which is strictly and properly an *indemnity*. Mr. Smith, by selecting this as a Leading Case, and not impugning it, seems to give some additional weight to it. In the note at p. 170, of Vol. 2, he says: “The principal case of *Godsall v. Boldero* did not, indeed, turn on the statute of 14 G. 3, but on the common-law doctrine, that insurance is a contract of indemnity. The act applies to cases where there never was an interest to insure; the common-law doctrine to cases where there was an interest, but the insured has been indemnified without the aid of the insurers. The doctrine established by *Godsall v. Boldero*, as applicable to such cases, is recognised in *Ex parte Andrews*, in *re Emett*, 1 Madd. 573.” *Ex parte Andrews*, however, was decided on another point, though it certainly assumes *Godsall v. Boldero* to be law. It was also in some sort recognised by Lord Tenterden in *Barber v. Morris*, 1 M. & Rob. 62: but it was not necessary to the decision of the case. So, in *Henson v. Blackwell*, 4 Hare, 434, which was a somewhat remarkable case. A debtor and his wife joined in an assignment of the chose in action of the wife to a

creditor of the husband, to secure 300*l.* owing by the husband. The creditor afterwards insured the life of the wife in a sum of 200*l.* The chose in action was not reduced into possession in the life-time of the wife. The wife died, and the creditor received from the insurance office the 200*l.* : and it was held, in a suit for redemption, that, if the creditor had no insurable interest in the life of the debtor's wife, the debtor could have no claim to the application of the sum insured towards the payment of his debt ; that there the creditor *had* such insurable interest, but the risk ceased at the death of the wife ; and that the money afterwards paid by the insurance office, being paid in their own wrong, the debtor was not entitled to have it applied in reduction of his debt. All these cases are the offspring of *Godsall v. Boldero*, and must fall with it. Upon what principle is it that a policy is operative in the hands of the assignee, if the contract be a mere contract of indemnity ? And that it is so available in the hands of the assignee, is clear from *Ashley v. Ashley*, 3 Simons, 149, and numerous other cases. Here, the Anchor Assurance Company had paid two annual premiums on this policy before the arrangement entered into with Wright. The policy, therefore, was worth something. They might have sold it ; and the title of the purchaser would not have been affected by what afterwards took place between them as to the annuities : he still would have had an interest in the Duke's life.

Channell, Serjt. (with whom were *Partridge* and *Coxon*), contra. The plaintiff can only recover in respect of an interest in the life insured continuing down to the period of the death. [*Parke*, B. You had better address yourself to the question whether or not an interest at the time of the contract is sufficient. If we should think that not enough, we can hear you on the other point afterwards.] The cases of fire and ma-

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.

 DALBY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

rine insurances do not materially bear upon the question now to be discussed. They are upon the face of them contracts of indemnity, and nothing more. Many cases have decided that the interest in fire policies must continue down to the time of the fire: it will be enough to cite one,—*The Sadlers' Company v. Badcock*, 2 Atk. 554. As to marine assurances,—before the passing of the 19 G. 2, c. 37, doubts had been entertained whether a policy “interest or no interest” was good: and the courts had at last arrived at the conclusion that such policies were not void at common law, but that, if the policy did not so state, it must be taken to be a policy on interest; and a declaration on such a policy would be bad if it did not aver interest. That state of things was corrected by the 19 G. 2, c. 37, which passed for the purpose of invalidating wager policies, with two or three exceptions. The question does in some degree depend upon the decision in *Godsall v. Boldero*. Supposing that case to be rightly decided, on the ground stated on the other side, it will govern the present. But it may also be supported on the ground that there was a cesser of interest before the commencement of the action. Lord Ellenborough never could have intended to use the word “indemnity” in the sense which has been suggested. The debt there was paid before the expiration of three months after Mr. Pitt’s death: there was, therefore, no vested right of action at the time. [*Parke, B.* There was a vested right to the money immediately on the death.] The decision of *Godsall v. Boldero* took place long after the passing of the 14 G. 3, c. 48: and Lord Ellenborough must be understood as speaking of the law as explained by that statute. Doubts formerly existed whether that statute was a declaratory or an enacting statute. In a case argued before the Exchequer Chamber in Ireland, —*The British Commercial Insurance Company v.*

Magee, 1 Cooke & Alcock, 182, where it had been contended at the Bar that the statute was only declaratory of the common law of England, Bushe, C. J., said: "No authority has been cited to shew that such an insurance has been held illegal, as being against policy or morals, in any case decided in England before the statute; and it is only necessary to look at the statute, to be satisfied that it is not declaratory, for, it does not recite any existing doubt, or prevailing mistake as to the law, but, on the contrary, recites 'that making insurances on lives or other events in which the assured shall have no interest, has been found by *experience* to have introduced a mischievous kind of gaming,' and then enacts, 'that, *from and after the passing* of this act, no insurance shall be made in which the insured shall have no interest:' thus recognising the frequency of the practice, and the necessity for preventing it *in future*." It may be conceded that the contract would not be invalidated at common law. But, to hold the statute 14 G. 3, c. 48, s. 1, to be confined to interest *at the time of the contract*, will be giving the statute a construction more narrow than its language fairly warrants. Whatever be the true construction of the 1st section, it must be read in conjunction with the 3rd, which provides, that, "in all cases where the insured *hath* interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, event or events." Taking these two sections together, their meaning is, that a policy on the life of a third person, is a contract of indemnity to the extent that the statute has so made it, viz. to the extent of the interest the party seeking to enforce it has at the time of suing. And to that extent Lord Ellenborough's judgment in *Godsall v. Boldero* is right. The statute has made it a contract of indemnity because nothing could be recovered

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

on it but the interest at the time of the death. [*Alderson*, B. Lord Ellenborough means to say that a man insuring his own life enters into a contract of indemnity. It is impossible for words to be plainer.] There may be some little inaccuracy in the report: but the case may be supported on the ground above suggested. *Godsall v. Boldero* has received the sanction of many eminent judges. Lord Tenterden, in *Barber v. Morris*, 1 M. & Rob. 62, treated it as a sound decision. In *Phillips v. Eastwood*, 1 Lloyd & Goold (Cases temp. Sugden), 270, 290, it was cited: and the Lord Chancellor said: "As between the insurance office and the insured, the policy of assurance is only a *contract of indemnity*; but, as between man and man, it is generally treated as an additional permanent security. There may be various sorts of policies: a man has an interest in his own life, and may insure it; that is, in effect, a contract with the office to have a sum of money paid at his death. The character of an insurance by way of indemnity is, to provide for the case where the party may sustain a loss. But, where the object is to secure a debt or sum of money in the nature of a loan, there it is, in the hands of the creditor, and as between him and the debtor, in the nature of an additional security for the debt." His Lordship adopts the view above suggested: and the case shews that there is an obvious and a sound distinction between an assurance on a man's own life, and an insurance by a creditor for the purpose of securing a debt. In *Humphrey v. Arabin*, 2 Lloyd & Goold (Cas. temp. Plunket), 318,—where it was held, that payment to a creditor by an assurance company of the amount of a policy on the life of the debtor is not pro tanto a satisfaction of the debt of the latter,—*Godsall v. Boldero*, and *Ex parte Andrews* having been cited, the Lord Chancellor said: "That case (*Godsall v. Boldero*) was upon an assurance made under the law of England with the Pelican Life-

Assurance Company on the life of Mr. Pitt. The debt due to the plaintiff by Mr. Pitt was paid by his executors, and the plaintiff having brought his action against the assurance company on the policy, and that fact being pleaded by them and found by the verdict, it was decided by the court of King's Bench, on a case reserved, that the payment of the debt by the executors was a discharge to the assurance company, and the fact of the funds being supplied aliunde made no difference. The proposition, therefore, that 'the satisfaction of the debt discharges the insurer,' is now undeniable. But it by no means follows that the converse of the proposition is true, and that the payment by the insurer shall amount to a satisfaction of the debt. No authority has been cited to sustain this latter proposition. The case of *Ex parte Andrews*, 2 Rose, 410, has been cited for the purpose; but it does not decide the question, and appears to me rather to furnish a contrary inference." And, after commenting upon that case, his Lordship proceeds,—“The argument of Lord Ellenborough in the case of *Godsall v. Boldero* rests merely on the decision of Lord Mansfield in the case of *Hamilton v. Mendes*; and both cases go altogether upon the contract with the insurers being a contract of indemnity. Now, this grows solely out of the enactments of the legislature, and on the contract being such an one as the law gives effect to: and it is a mistake to say, as it has been argued in this case, that therefore the insurer is in the nature of a surety for the payment of the debt of the principal debtor. The protection of the insurer grows merely out of the policy of the law, and the particular enactment of the legislature: but, with reference either to the party who gets the insurance, or with reference to the debtor, there is no circumstance which puts him in the character of a surety for the debtor. He has no right to call on the debtor's executors to pay the debt; and it is

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.
 DABY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

no concern of his whether the debtor is able to pay or utterly insolvent." Here, then, we have an adoption of Lord Ellenborough's decision in *Godsall v. Boldero*, by Sir John Leach, V. C., in *Ex parte Andrews*, 2 Rose, 410, by Sir James Wigram, V. C., in *Henson v. Blackwell*, 4 Hare, 434, by Lord St. Leonards, C., in *Phillips v. Eastwood*, 1 Lloyd & Goold, 270, and by Lord Plunket, C., in *Humphrey v. Arabin*, 2 Lloyd & Goold, 318. And it is certainly somewhat singular that these objections to the soundness of the decision in *Godsall v. Boldero* should now be presented for the first time. [*Alderson*, B. Lord St. Leonards adds, in *Phillips v. Eastwood*,—" *Godsall v. Boldero* decided that the money could not be recovered from the office, if the debt were paid aliunde; but the offices have not found it to be for their benefit to act on the rigid rule, and I believe they generally pay without inquiry." *Godsall v. Boldero*, therefore, seems not to have been acted upon by the offices; and it could not have been carried to a court of error.] It is submitted that *Godsall v. Boldero* was rightly decided,—assuming that it went on the ground that the policy is a contract of indemnity, by reason of the provision contained in the 3rd section of the 14 G. 3, c. 48. If that section limits the creditor's right to sue on the policy where the interest ceases before the death, that will support *Godsall v. Boldero*, and entitle the defendants to judgment.

Bramwell, in reply. It is said that *Godsall v. Boldero* has never been disparaged until to-day. But it is clear, that, by common consent, it has never been acted upon; and it is now conceded that the reasoning of the judgment cannot be supported. The argument upon which it is endeavoured to sustain the decision, departs from the grammatical construction of the statute. The word "hath," in the 3rd section refers, not to the time of the

action brought upon the policy, but to the time of entering into the contract. In truth, the 3rd section merely intended to limit the party's right to recover, to the extent of the interest he had in the life, or other event, when the policy was effected. [*Alderson*, B. The clause was inserted in order to prevent colourable insurances. A man might lend another 5*l.*, to enable him to insure for 10,000*l.*]

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

PARKE, B. If we should, upon consideration, think that the interest must be a continuing interest, as my Brother Channell contends, we will hear the matter further discussed upon the question whether the facts disclosed upon this bill of exceptions shew such continuing interest.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court:—

This case comes before us on a bill of exceptions to the ruling of my Brother Cresswell at nisi prius. We learn, that, on the trial, he reserved the important point which arose in it for the consideration of the court of Common Pleas; and that, when it came on for discussion, it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal: and we have now, after a very able argument on both sides, to dispose of it in this court of error.

It is an action on what is usually termed a policy of life-assurance, brought by the plaintiff as a trustee for the Anchor Assurance Company, on a policy for 1000*l.* on the life of his late Royal Highness, the Duke of Cambridge.

The Anchor Life-Assurance Company had insured the Duke's life in four separate policies,—two for 1000*l.*, and two for 500*l.* each, granted by that company to one

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

Wright. In consequence of a resolution of their directors, they determined to limit their insurances to 2000*l.* on one life; and, this insurance exceeding it, they effected a policy with the defendants for 1000*l.*, by way of counter-insurance.

At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards, an arrangement was made between the office and Wright, for the former to grant an annuity to Wright and his wife, in consideration of a sum of money, and of the delivery up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the Duke's death.

It may be conceded, for the purpose of the present argument, that these transactions between Wright and the office totally put an end to that interest which the Anchor company had when the policy was effected, and in respect of which it was effected: and that, at the time of the Duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever.

This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon.

If the court had thought some interest at the time of the Duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion.

There is the usual averment in the declaration, that, at the time of the making of the policy, and thence until the death of the Duke, the Anchor Assurance Company was interested in the life of the Duke, and a plea, that they were not interested *modo et formâ*,—which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was suffi-

cient to make it valid in point of law: *Lush v. Russell*, 5 Exch. 203. We are all of opinion that it *was* sufficient; and, but for the case of *Godsall v. Boldero*, 9 East, 72, should have felt no doubt upon the question.

The contract commonly called life-assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.

Policies of assurance against fire and against marine risks, are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 G. 2, c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the 14 G. 3, c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager-policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court, in *Cousins v. Nantes*, 3 Taunt. 315, to have been solemnly determined in the case of *Lucena v. Crawford*, 2 Bos. & P. 324, 2 N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the court of error in Ireland, before all the judges except three, in *The*

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

Definition of
the contract of
life-assurance.

Fire and
marine policies.

1854. *British Insurance Company v. Magee, Cooke & Alcock*,
 182, that the insurance was legal at common law.
 DALBY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

The statute
 14 G. 3, c. 48
 considered.

The contract, therefore, in this case, to pay a fixed sum of 1000*l.* on the death of the late Duke of Cambridge, would have been unquestionably legal at common law, if the plaintiff had had an interest thereon or not : and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 G. 3, c. 48. This depends upon its true construction.

The statute recites, that the making insurances on lives and other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming : and, for the remedy thereof, it enacts " that no insurance *shall be made* by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account, such policy shall be made, *shall have* no interest, or by way of gaming or wagering ; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge,—and that to the amount of 1000*l.*, because they had bound themselves to pay a sum of 1000*l.* to Mr. Wright on that event,—the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount, if there were no other provisions in the act.

This contract is good at common law, and certainly not avoided by the 1st section of the 14 G. 3, c. 48. This section, it is to be observed, does not provide for *any particular amount* of interest. According to it, if there *was any* interest, however small, the policy would not be avoided.

The question arises on the third clause. It is as follows:—"And be it further enacted, that, in all cases where the insured *hath* interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the assured in such life or lives, or other event or events."

1854.

DALEY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

Now, what is the meaning of this provision?

On the part of the plaintiff, it is said, it means only, that, in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under colour of a small interest, a wagering policy might be made to a large amount,—as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest *at the time of effecting the policy*. Upon that value, the assured must have the amount of premium calculated: if he states it truly, no difficulty can occur: he pays in the annuity for life the fair value of the sum payable at death. If he misrepresents, by over-rating the value of the interest, it is his own fault, in paying more in the way of annuity than he ought; and he can recover only the true value of the interest in respect of which he effected the policy: but that value he *can* recover. Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to the amount on both sides.

Plaintiff's argument.

This construction is effected by reading the word "*hath*" as referring to the time of effecting the policy. By the 1st section, the assured is prohibited from effecting an insurance on a life or on an event wherein he "*shall have*" no interest,—that is, at the time of assuring: and then the 3rd section requires that he shall cover only the interest that he "*hath*." If he has an

1854.

 DALBY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the 3rd section provided that no more than the amount or value of the interest should be *insured*, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void: but the prohibition to recover or receive more than that amount, obviates any difficulty on that head.

Defendants' argument.

On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

The words must be altered materially, to limit the sum to be recovered to the value *at the time of the death*, or (if payable at a time after death) when the cause of action accrues.

But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then-existing interest, in the event of death, in consideration of a fixed annuity calculated with reference to that sum; but a contract to pay,—contrary to its express words,—a *varying* sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict, or execution; and yet the price, or the premium to be paid, is fixed, calculated on the original fixed value, and is unvarying; so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a

right to recover an uncertain sum, viz. that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all.

This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute, that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself.

The only effect of the statute, is, to make the assured value his interest at its true amount when he makes the contract.

But it is said that the case of *Godsall v. Boldero*, 9 East, 72, has concluded this question.

Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life-policy was in its nature a contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought: and his Lordship relied upon the decision of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not of the nature of what is termed an assurance for life: it really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

Remarks on
Godsall v.
Boldero.

1854.

DALBY

v.

THE INDIA
ANDLONDON LIFE-
ASSURANCE
COMPANY.

interest in the duration of the life, it is not prohibited by the statute 14 G. 3, c. 48.

But, though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not, and could not be, questioned in a court of error: for, one of the issues, *nil debet*, was found for the defendant.

Since that case, we know practically, and that circumstance is mentioned by some of the judges, in the cases hereinafter referred to, that the insurance-offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interest to do so. They have therefore, generally speaking, paid the amount of their life-insurances, so that the number of cases in which it could be questioned is probably very small indeed. And it may truly be said, that, instead of the decision in *Godsall v. Boldero* being uniformly acquiesced in, and acted upon, it has been uniformly disregarded.

Barber v.
Morris.

Then, as to the cases. There is no case at law, except that of *Barber v. Morris*, 1 M. & Rob. 62, in which the case of *Godsall v. Boldero* was accidentally noticed as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. It was proved in that case to be the practice of the particular office in which that assurance was made, to pay the sums assured, without inquiry as to the existence of an insurable interest: and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover,

on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment, in not disclosing that the interest had ceased. This was the point of the case: and, though there was a dictum of Lord Tenterden, that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case.

The other cases cited on the argument in this case, were cases in equity, where the propriety of the decision of *Godsall v. Boldero* did not come in question.

The questions arose as to the right of the creditor and debtor, inter se, where the offices have paid the value of a policy, in *Humphrey v. Arabin*, 2 Lloyd & G. 318, *Henson v. Blackwell*, 4 Hare, 434, cor. Sir J. Wigram, V. C., *Phillips v. Eastwood*, 1 Lloyd & G. (Cas. temp. Sugden) 281,—where the point decided was, that a life-policy, as a security for a debt, passed under a will bequeathing debts: the Lord Chancellor stating that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero*. In these cases, the different judges concerned in them do not dispute,—some, indeed, appear to approve of,—the case of *Godsall v. Boldero*: but it was not material in any to controvert it; and the questions to be decided were quite independent of the authority of that case.

We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case, which itself could not be questioned by writ of error; and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry; and as, in practice, it may be said that it has been constantly disregarded.

Judgment reversed, and venire de novo. (a)

(a) The following very pertinent remarks upon the subject, and strictures upon the judgment in *Godsall v. Boldero*, are

1854.

DALEY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

found in Professor De Morgan's valuable Essay on Probabilities, pp. 214, et seq. :—

"The word *insurance* or *assurance* has given rise to some wrong notions; and it will be worth while to examine the nature of the contract. A. & Co. engage with B. that, in consideration of 1*l.* a year, paid by him during his life, they will pay 20*l.* to his representatives as soon as he shall be dead. Both parties run a risk; A. & Co. that of having to pay B. more than they receive; B., that of paying more than will at his death produce 20*l.* But the risk of the office is of immediate loss; and that of B., of deferred loss: that of the former is also continually lessening, and that of the latter increasing; until, should B. live long enough, both risks become certainties. If the insurance be only for a term of years, B. runs the risk of losing his premiums altogether.

"The office does not inquire what reason B. may have for insuring his own life or that of another person, nor do any possible contingencies, except those of life, affect the office calculations. We cannot, therefore, be too much surprised at the ignorance shewn by that judge who declared that life-insurance was of its own nature a contract of indemnity; that is to say, if, by any lucky chance, B. can be proved to have accomplished the object for which he insured by other means, he has

no claim upon the office. The circumstances are as follows; and the absurd conclusion is law, and would be practice, if the insurance offices had not refused to acknowledge the decision, or protect themselves by the precedent. A. & Co. covenanted with B. to pay 500*l.*, if C. should die within the term of seven years next ensuing, in consideration of the usual premium. C. did die within the term; and A. & Co., in answer to a claim of 500*l.*, replied, that the intention of B. in insuring the life of C., was, to obtain security for the payment of a debt of 500*l.*, due by C. to B., which debt had been already paid by C.'s executors: consequently they owed nothing to B. An action was brought by B., and defended by A. & Co. on the above plea; and a special case being made, the point was decided by the court of Queen's Bench against the plaintiffs; thereby establishing the principle, that life-insurance is a thing similar to fire or ship insurance; namely, a contract of indemnity, to be fulfilled with allowance for salvage.

"The defendant's case rested upon the asserted nature of the contract, and the statute 14 G. 3, c. 48, which enacts, that 'no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life.' The act does not state at what time this interest is to be reckoned, but the plaintiffs

contended *that the time of death* was the meaning of the statute; the defendants averred, and the court decided, *that the time of bringing the action* was to be understood. The plaintiffs contended that the debt was not the object of insurance, but the life of the insured; the court decided, that 'This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by the death, existing and continuing to exist at the time of the action brought; and, being so founded, it follows, of course, that if, before the action was brought, the damage which was at first supposed likely to result to the creditor was wholly obviated and prevented by the payment of his debt, the foundation of any action on his part, on the ground of such insurance, fails.' This sentence contains nothing but very good sense, and, no doubt, very good law: but the application of it was accompanied by a mistake as to the nature of the damnification which the plaintiffs had sustained. The counsel on both sides, the court, the insurance office, and the plaintiffs themselves, shewed a very partial knowledge of the nature of the contract; and I make no doubt, that almost every person who heard it agreed with the court, however much they might impugn the decision on other grounds, that the damage to the creditor 'was wholly obviated and pre-

vented by the payment of his debt.'

"In order to shew that such was not the case, we must suppose that an exactly similar transaction had taken place before any insurance office existed. How this could have been may not be apparent, if we take the notion which the law formerly entertained of such an office, namely, that it is a species of gambling house: but if we prefer to consider it as a savings bank, with an equalization system, which is unquestionably the correct notion, we may return to the circumstances which the case would have presented had there been no insurance. C., a person whose credit has become doubtful, is indebted to B. to an amount which B. could not afford to lose; consequently, B., knowing that his chance of payment is precarious, resolves to diminish his expenses, hoping by economy to restore to his family the sum which he may have lost by his engagements with C. He collects, accordingly, a small fund, which he places with his banker, avowing the purpose of its collection. In the mean time C. dies, and some friends pay off his debts, and that due to B. among the rest. The latter having now no further occasion for such economy, draws upon his banker for the amount, and is answered, that, since the purpose of the saving was fulfilled by the payment of C.'s debt, he, B., has no fur-

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

1854.
 DALLEY
 v.
 THE INDIA
 AND
 LONDON LIFE-
 ASSURANCE
 COMPANY.

ther claim upon his own money. An action is brought, and the courts decide that the banker is right, and that B., having really attained his object in one way, has no right of property in the proceeds of another attempt to serve the same purpose.

"The only distinction between the case just put and that which actually occurred, is, that the banker was a person who gained his profits by receiving such savings during a contingent term, and guaranteeing a fixed sum; standing the loss, if there were any, and paying himself for it out of the gain which would accrue in another instance: the premium having been calculated so as to insure a moral certainty of profit upon the average of similar cases. It is not pretended, on either side, that the chance of indemnification at the hands of C.'s executors was made to lessen the consideration paid by B. for the guarantee; and the legal iniquity of the decision may, I think, be made clear, as follows:

"It will hardly be disputed, firstly, that the legislature is the judge of what shall constitute valuable consideration; and, secondly, that a consideration which is expressly allowed to be good in a statute, should be admitted as such in the decisions of the courts. Now, the contract of insurance, be it gambling, or be it not, rests entirely upon the permission given by the law to

consider a high chance of a small sum as good consideration for a low chance of a large sum. If I now pay 2*l.* of premium for 100*l.*, in case I should die in a year, and if my executors can maintain an action for 100*l.*, it must be because the law sanctions the notion that 2*l.*, nearly certain, may, with consent of parties, be considered as an actual equivalent for a distant chance of 100*l.*, as much so as one weight of silver for another of bread, or food, clothing, and wages for personal service. It is true that the same law, fearing certain reputed immoral practices, to which the power of making a particular bargain offers temptations, may limit the circumstances under which it will permit such bargains to be made; but this is equally true in regard to the other sort of contracts mentioned: indeed, there is no sort of bargain which is not under regulation. The law, then, allows risks, and permits unequal chances to be compensated by giving odds; the courts declare, that, after the cast shall have been made, and one of the parties shall have stood his risk, which turns out in his favour, the other party shall receive an *ex post facto* release from the conditions of his bargain, because circumstances afterwards arise, which, had they existed at the time of making the bargain, would have made it illegal. The several principles on which the decision was found-

ed, well carried out, as they say in parliament, would require that the previous contracts of a man who becomes insane should be null and void; that the meat which a man buys for his dinner should be returnable to the butcher under the cost, if a friend should invite him in the mean time; and, in the case before us, supposing that C. should have outlived the term, and his debt were paid, as before, then B. might have brought his action against the office, for the return of the premiums; alleging

that, as it turned out, the office would have been indemnified, and therefore, should be considered as having run no risk." . Since the decision in the principal case, the point has arisen before Vice-Chancellor Wood, in a case of *Law v. The Indisputable Life-Policy Company*, 1 Jurist, N. S., 178; and his Honor decided in accordance with the above judgment, entirely adopting the reasoning therein.

See also the observations on *Godsall v. Boldero*, in Bunyon on Life Assurance, p. 23.

1854.

DALBY
v.
THE INDIA
AND
LONDON LIFE-
ASSURANCE
COMPANY.

EDWARDS v. GRIFFITH.

Nov. 15.

THE 168th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, enacts, that, "instead of the present proceeding by ejectment, a writ shall be issued, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty." The 169th section enacts, amongst other things, that "the writ shall state the names of all the persons in whom the title is alleged to be, and command the persons to whom it is directed, to appear, within sixteen days after service thereof, in the court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit, and it shall contain a notice, that, in default of appearance, they will be turned out of possession." And the 170th section enacts that "the writ shall be served

Quare, whether the affidavit (required by the 112th rule of Hilary Term, 1853,) of service of the writ of ejectment under the 170th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, should shew (as under the old practice) that the nature and object of the service were explained to the party served.

At all events, an irregularity in that respect is waived by a subsequent attornment.

1854.

EDWARDS
v.
GRIFFITH.

in the same manner as an ejectment has heretofore been served, or in such manner as the court or a judge shall order, and, in case of vacant possession, by posting a copy thereof upon the door of the dwelling-house, or other conspicuous part of the property."

Coxon, on a former day in this term, obtained a rule nisi to set aside the judgment and execution in this case, and for a writ of restitution, on the ground that the affidavit upon which the judgment was signed did not shew that the nature and contents of the notice contained in the writ were read over or explained to the tenant in possession. The affidavit on which the motion was founded, stated, that, when the copy of the writ was delivered to the defendant, he was informed by the person who served it that it was to require him to go to an office in Caernarvon to give evidence as to a pedigree.

Welsby now shewed cause, upon an affidavit stating that the defendant perfectly well knew the nature of the proceeding, and that after the service of the writ, he attorned to the plaintiff. He submitted that, the new proceeding being perfectly simple and plain, there was no longer the same necessity which formerly existed of explaining the nature and object of the service to the tenant: and that the 170th section of the statute, by merely providing that the *service* should be the same as heretofore, impliedly dispensed with the accompanying explanation. [*Jervis*, C. J. Certainly, the statute does not say that the affidavit of service shall be in the old form.]

Coxon, in support of his rule. The 112th rule of Hilary Term, 1853, provides that "no judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed, without first filing an affi-

davit of the service of the writ according to the Common Law Procedure Act, 1852, and a copy thereof." This special provision would have been unnecessary if nothing more was required than the common affidavit of service.

1854.

EDWARDS
v.
GRIFFITH.

JERVIS, C. J. It is unnecessary for us to decide on the present occasion whether or not the affidavit should be as special as was required under the old form of proceeding. But, assuming that it ought to have been, and that the plaintiff has been guilty of an irregularity in that respect, it clearly is a mere irregularity, and I am of opinion that the defendant has waived it by admitting that he was duly served, and afterwards attorning to the plaintiff. I think the rule must be discharged.

WILLIAMS, J. (a) I am of the same opinion. This is at the best a mere technical irregularity which the defendant has by his conduct waived.

CROWDER, J., concurred.

Rule discharged.

(a) Maule, J., was absent on account of indisposition.

1854.



Nov. 13.

A. agreed with B., that he would endeavour to sell a picture belonging to B., and that, if he succeeded in selling the same, B. should pay him 100*l*. B. died before the picture was sold.

In an action against the administratrix of B. upon the above agreement, the count alleged, that, in pursuance of the agreement, A. did, before and after the death of B., endeavour to sell, and after the death of B. he did, in consequence of such endeavours, succeed in selling the picture, "which sale was confirmed by the defendant as administratrix as aforesaid;" and that she refused to pay the 100*l*.:—

Held, that the count disclosed no cause of action, inasmuch as the authority from B. to A., to sell the picture, was revoked by B.'s death, and the defendant's confirmation of the sale, in the absence of an allegation that she was aware of the existence of the contract between A. and B., was no adoption of the contract by her, so as to make her liable to pay the 100*l*.

DOMINICO CAMPANARI *v.* MARY FRANCES WOODBURN,
Administratrix of SAMUEL WOODBURN, Deceased.

THE declaration stated that it was agreed between the plaintiff and the said intestate, that the plaintiff should endeavour to sell a certain picture of the said intestate, and that, if the plaintiff succeeded in selling the same, the said intestate would pay him 100*l*.; that, in pursuance of the said agreement, he did before and after the death of the said intestate endeavour to sell, and after the death of the said intestate he did, in consequence of such endeavours, succeed in selling the said picture, which sale was confirmed by the defendant as administratrix as aforesaid; yet the defendant, as such administratrix, had made default in paying the said 100*l*., which was still due from her as administratrix, and unpaid.

There was a second count, for money payable by the said Samuel Woodburn in his lifetime to the plaintiff, for work and labour, journeys, services, business, and attendances done, performed, and bestowed, and materials provided by the plaintiff for the said Samuel Woodburn, at his request, and for money found to be due from the said Samuel Woodburn to the plaintiff on accounts stated between them in the life-time of the said Samuel Woodburn, and for money payable by the defendant, as administratrix as aforesaid, to the plaintiff, for money found to be due from the defendant, as such administratrix as aforesaid, to the plaintiff, on accounts stated between them since the death of the said Samuel Wood-

burn: And the plaintiff claimed 400*l.* for debt, and 20*l.* for detention.

1854.

CAMPANARI
v.
WOODBURN.

The defendant demurred to the first count,—the ground of demurrer marked in the margin being, “that there is no allegation in the said first count of any contract by the defendant to pay 100*l.* on the sale of the picture, and any such contract must have been with the defendant personally, and not as administratrix.”

The defendant also pleaded,—first (to the first count), that it was not agreed in manner and form as in that count alleged,—secondly (to the first count), that the plaintiff did not succeed in selling nor sell the said picture as alleged,—thirdly (to the residue of the declaration except as to 115*l.*, part of the money claimed for debt), that, except as aforesaid, neither the said Samuel Woodburn in his life-time, nor the defendant, as administratrix as aforesaid, since his death, ever was indebted as alleged,—fourthly (to the residue of the declaration, except as aforesaid), that, before action, the said Samuel Woodburn, in his life-time, and the defendant, as administratrix as aforesaid, since his death, satisfied and discharged the plaintiff’s claim in respect of the matters therein pleaded to, by payment,—fifthly (as to 188*l.*, parcel &c., and damages for the detention thereof), payment into court of 115*l.*, and also the further sum of 1*s.* for the detention thereof.

The plaintiff joined issue on the first four pleas, and took out of court the 115*l.* and 1*s.*, in satisfaction pro tanto.

Willes, in support of the demurrer.(a) The count

(a) The points marked for argument on the part of the defendant, were,—

“1. That the first count of the declaration is bad:

“2. That the authority of the plaintiff from the intestate, must be considered to have ceased upon the death of the intestate; and therefore a sub-

1854.
 CAMPANARI
 v.
 WOODBURN.

discloses a case of agency only, which was revoked by the death of the testator. The cause, therefore, could only be in respect of some transaction between the plaintiff and the defendant in her individual character. [*Jervis*, C. J. A confirmation of the authority by the administratrix, might set up the agency.] No action will lie against an executor or administrator in his representative character, for work done after the death of the testator or intestate, except where it was commenced before the death. [*Crowder*, J. The plaintiff's endeavours to sell the picture may have been attended with expense.] The plaintiff does not proceed for that. The authority of a factor, whether general or special, is revocable: *Smart v. Sandars*, antè, Vol. III, p. 380; even though he is under advances; Vol. V, p. 895. In that case, *Wilde*, C. J., after referring to several cases,—and, amongst others, to *Vynior's Case*, 8 Co. Rep. 82. a., *Walsh v. Whitcombe*, 2 Esp. N. P. C. 565, *Watson v. King*, 4 Campb. 272, and *Gausson v. Morton*, 10 B. & C. 731,—says: "The result appears to be, that, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is

sequent sale of the picture by the plaintiff could not entitle the plaintiff to the reward of 100*l*."

"3. That, if the confirmation of the sale by the defendant could operate as an adoption by her of the alleged contract,—of which it is not stated that she had any knowledge,—it would make her personally liable to the plaintiff, and not as administratrix:

"4. That the confirmation of the sale by the defendant could have no other effect than that of making the defendant personally liable to the plaintiff for a reasonable remuneration for the selling of the picture:

"5. That the picture, at the time of the alleged sale, was not the picture of the intestate, but of the defendant as administratrix."

commonly said to be irrevocable." [Williams, J. The doctrine of *Smart v. Sandars* was still further acted upon in this court, in *Taplin v. Florence*, antè, Vol. X, p. 744, where it was held, that an auctioneer who is employed to sell goods by public auction, has not such an *interest* as will make the licence to enter the premises for that purpose irrevocable.] Without the allegation of a confirmation of the sale by the defendant, the count clearly would disclose no cause of action. In *Smout v. Ilbery*, 10 M. & W. 1, where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad,—it was held that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties. [Jervis, C. J. I must confess I have always had great difficulty in understanding that case.] The ground upon which the decision proceeded was, that "there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal." In *Blades v. Free*, 9 B. & C. 167, 4 M. & R. 282, where a man who had for some years cohabited with a woman, who passed as his wife, went abroad, leaving her and her family at his residence in this country, and died abroad,—it was held, that the woman might have the same authority to bind him by her contracts for necessaries as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before informa-

1854.

 CAMPANARI
 v.
 WOODBURN.

1854.
 CAMPANARI
 v.
 WOODBURN.

tion of his death had been received. And Littledale, J., said: "The tradesman cannot be better off than if this had been a question upon the contract of a wife; and her contracts cannot bind the husband's estate, if made after his death." At all events, if liable at all, the defendant cannot be liable in her representative character: *Corner v. Shew*, 3 M. & W. 350.

Maude, contra. (a) It is quite unimportant whether the defendant be liable upon this contract personally or in her representative character only. It is only the first count that is before the court here: no question of misjoinder therefore can arise. The general rule, no doubt, is, that death would be a revocation of the authority. But, having taken advantage of the contract, and confirmed the sale, the administratrix cannot be permitted to deny her liability. [*Crowder, J.* It does not appear that the defendant had any knowledge of the contract at all.] The sale was in pursuance of the contract; the allegation, therefore, that the administratrix confirmed the sale does substantially amount to an allegation that she had knowledge of the contract. In 2 Williams on Executors, 4th edit., p. 1466, it is said: "It is clear, that, in many cases, a liability may accrue against the executor or administrator, after the death of the testator or

(a) The points marked for argument on the part of the plaintiff, were,—“That the first count shewed a contract between the plaintiff and the deceased, and that the agreement on the plaintiff's part to endeavour to sell was sufficient consideration for the deceased's promise to pay if the endeavour should be successful; that the first count shewed a con-

promise, and the happening of the event on which the plaintiff was to be paid; and that, generally, when one man contracts with another to do something for which that other agrees to pay, the contract is not dissolved by the death of the party who is to pay, and is binding on his personal representative, except in certain peculiarly personal cases, of which the present was not one.”

intestate, upon a contract made in his life-time, although the executor or administrator be not named therein. Thus, the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator. So, where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was holden, that, if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming him: *Bro. Covenant*, pl. 12; *Bac. Abr. Executors* (P.) 1. So, if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract: *Per Coke, C. J., Quick v. Ludborrow*, 3 Bulstr. 30. And, in cases of this kind, the executors will be liable even where the heir is named, and the executors are not named in the contract: *Williams v. Burrell*, *antè*, Vol. I, p. 402. Hence, it appears that executors or administrators more actually represent their testator or intestate than the heir does the ancestor; for, if a man binds himself, his executors and administrators are bound, though not named, but it is not so of the heir, however large an amount of real assets may have descended to him." These authorities shew that the administratrix here cannot be allowed to take advantage of the sale, without acknowledging the contract. In *Dowse v. Cox*, 3 Brigh. 20, 10 J. B. Moore, 272 (a), where, upon matters being referred to arbitration by an order of the Vice-Chancellor, with a clause, that, in case of the death of any of the parties before making the award, the reference was not to abate, but their executors or administrators were to be considered and taken as parties to the order,—it was held, that the executors of a party who died during the reference, and who were ordered by the award to pay a sum of money out of their testator's

1854.

 CAMPANARI
 v.
 WOODBURN.

(a) And see *Biddell v. Dowse*, 6 B. & C. 255, 9 D. & R. 404.

1854.

 CAMPANARI
 v.
 WOODBURN.

assets, were liable in assumpsit, although it was objected that the promise alleged to have been made by them was a personal promise, and for which no consideration was stated. And in *Powell v. Graham*, 7 Taunt. 580, 1 J. B. Moore, 305, a promise made upon good consideration by a testator, that his executor shall pay, was held to be a sufficient consideration for an action in assumpsit against the executor. [*Jervis*, C. J. To pay out of the assets of the testator.] The court will not be disposed to carry the doctrine of *Smout v. Ilbery* any further.

Willes, in reply. Reliance is placed on the other side upon a supposed confirmation of the contract by the administratrix, by confirming the sale. But, to make that argument available, it should be shewn, that, when she confirmed the sale, she was aware that there was a contract between the plaintiff and the intestate for the payment to him of 100*l.* for his services. Here, confirmation of the sale would, no doubt, entitle the plaintiff to an action upon a quantum meruit. [*Williams*, J., referred to *Forster v. Wilson*, 12 M. & W. 191.] The authority of *Corner v. Shew* is not denied: it has been confirmed by numerous subsequent cases. The cases put in 2 *Williams on Executors*, 1466, as also *Powell v. Graham*, were clearly cases of contracts made by the testator which required no confirmation after his death to make them valid. *Rogers v. Dejoncourt*, 7 Irish Law Rep. 482, is very much in point. There, it was held, that, where a landlord entitled to a rent makes a distress, and dies without appointing an executor, neither a detainer of that distress, nor an original distress made by a party, can be justified in an avowry by the party subsequently taking out administration before the avowry.

JERVIS, C. J. I am of opinion that the defendant in this case is entitled to the judgment of the court. As

alleged on the face of the declaration, it does not appear that the original contract between the plaintiff and the intestate conferred upon the former an authority which was irrevocable: it simply states that it was agreed between the plaintiff and the intestate that the plaintiff should endeavour to sell a certain picture of the intestate, and that, if the plaintiff succeeded in selling the same, the intestate should pay him 100*l*. So far, therefore, as appears in the declaration, it was a mere employment of the plaintiff to do the act, not carrying with it any irrevocable authority. It is plain that the intestate might in his life-time have revoked the authority, without rendering himself liable to be called upon to pay the 100*l*., though possibly the plaintiff might have had a remedy for a breach of the contract, if the intestate had wrongfully revoked his authority after he had been put to expense in endeavouring to dispose of the picture. In that way, perhaps, the plaintiff might have recovered damages by reason of the revocation. His death, however, was a revocation by the act of God, and the administratrix is not, in my judgment, responsible for anything. It was no fault of hers,—as in *Smout v. Ilbery*,—that the contract was not carried out. It must be taken to have been part of the original compact between the plaintiff and the intestate, that, whereas, on the one hand, he would receive a large sum if he succeeded in selling the picture, so, on the other hand, he would take the chance of his authority to sell being revoked by death or otherwise. Mr. Maude seems to concede, that, but for what took place subsequently to the death of the intestate, the administratrix would have been liable: but he relies upon the allegation in the declaration, that the plaintiff sold the picture, and that the sale was confirmed by the defendant as administratrix; and contends that therefore she is liable. But it seems to me that that consequence by no means follows. If

1854.

CAMPANARI
v.
WOODBURN.

1854.
CAMPANARI
v.
WOODBURN.

the defendant as administratrix had, after the death of the intestate, ordered the sale of the picture, no doubt that would have been a new retainer, and she would have been liable to the plaintiff on a quantum meruit. If, with full knowledge of the contract under which the plaintiff was to receive 100*l.* as the stipulated reward for his exertions in selling the picture, the defendant had continued the employment, and it had resulted in a sale, the 100*l.* might have been taken by the jury as the measure of damages. But, without shewing that the defendant had any knowledge whatever of the original contract, the confirmation of the sale is relied on as a confirmation of the original contract. It is enough to say that the averment as to the confirmation of the sale by the defendant does not raise the point which Mr. Maude desires to raise. That confirmation, however it might make her liable to an action for a reasonable remuneration for the plaintiff's services, clearly is not sufficient to charge the defendant either personally or in her representative character for the breach of the original contract.

WILLIAMS, J. I am of the same opinion. It may be convenient to consider what the effect would have been if the declaration had omitted the averment of confirmation of the sale by the defendant. It would then have amounted to a mere statement of an agreement between the plaintiff and the intestate that the plaintiff should endeavour to sell the picture, and, if he succeeded in so doing, the intestate should pay him 100*l.* That clearly would have been revoked by the death. In such a state of things, the mere circumstance of something having been done under the contract, does not make it irrevocable. The contract, after the death of the intestate, was not and could not be confirmed according to its terms. It is perfectly clear, that, if the count had stood without the allegation that the administratrix con-

firmed the sale, it would have been utterly without foundation. What, then, is the effect of that averment? There is no allegation that the contract was confirmed as between the plaintiff and the deceased; but merely an allegation that *the sale* was confirmed by the defendant as administratrix. That is manifestly different from an averment that the original contract was confirmed by her, with all its incidents and all its consequences. I do not think it necessary,—though I entertain no doubt on the point,—to give any opinion as to what would have been the effect, if the declaration had contained such an allegation. The utmost that can be said, is, that the defendant, as administratrix, might have been liable on a quantum meruit for services performed by the plaintiff as her agent in relation to the sale: but she clearly could not be liable in the way in which she is sought to be charged here.

1854.

CAMPANARI
v.
WOODBURN.

CROWDER, J. I also am of opinion that the first count cannot be sustained. It is founded upon a special contract by which the intestate agreed to pay the plaintiff 100*l.* if he succeeded in his endeavours to sell a certain picture. Viewing it in the way suggested by Mr. Willes, and apart from the allegation as to the confirmation of the sale by the administratrix, it would, I think, be impossible to contend that the count could be sustained: there would be nothing to shew any legal liability in the administratrix to perform that contract. A revocation of a bare authority by death, is a very different thing from a revocation by the act of the party. In the latter case, the plaintiff would undoubtedly be entitled to recover the reasonable expenses he might have incurred in endeavouring to execute the authority: but, in the former, the failure would be the fault of no one; and, whatever might be the expense incurred, the plaintiff could not recover it against the administratrix. But

1854.

CAMPANARI
v.
WOODBURN.

it is said that here was a confirmation by the administratrix. Looking, however, at the declaration, I find no allegation that the original contract was confirmed, but merely an allegation, that, in pursuance of the said agreement, the plaintiff did, before and after the death of the intestate, endeavour to sell, and, after the death of the said intestate, he did, in consequence of such endeavours, succeed in selling the said picture, which sale was confirmed by the defendant as administratrix as aforesaid. It is a fallacy to infer that the confirmation of the sale is a confirmation of the contract originally entered into by the plaintiff with the intestate. And, if it were so, the confirmation would operate only as an authority to sell, and give the plaintiff a right to maintain an action against the administratrix upon a quantum meruit. Further it could have no effect. The defendant, therefore, is entitled to judgment.

Judgment for the defendant.

In the Matter of ELIZABETH HURST.

Nov. 25.

The court dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu, under the 3 & 4 W. 4, c. 74,—it being sworn that there was no English notary in the island.

BREWER moved that an acknowledgment taken at Corfu, under the 3 & 4 W. 4, c. 74, might be received and filed, without the usual notarial certificate. The affidavit of the due taking of the acknowledgment was sworn before the "chief magistrate." An affidavit was produced, which stated that there was no English notary resident in the island, and that the chief magistrate was a person duly authorised to take affidavits there. *Brewer* referred to a case of *In re Mary Daly*, antè, Vol. V, p. 128, where, an acknowledgment having been taken in a remote part of India, the court dispensed with the notarial certificate, it being certified by the officer in command of the district that the affidavit was sworn

before a person properly qualified, and that there was no notary there.

1854.

In re
HURST.

Per Curiam. The only question is, whether the affidavit is sworn before a properly qualified person. We think the affidavit of that fact may be received; but it must be attached to the proceedings, and filed with them.

Fiat.(a)

(a) See *In re Darling*, antè, *In re Baroness Dunsany*, antè, Vol. II, p. 357; *In re Crawford*, antè, Vol. IV, p. 626; Vol. VII, p. 119.

HADDAN v. LOTT.

Nov. 16.

THE first count of the declaration stated, that, before and at the time of the committing of the grievances

The first count of the declaration alleged that the plaintiff was the first

and true inventor of "improvements in the manufacture of fire-arms, also of cartridges, of priming, and of wads or wadding for fire-arms," and had petitioned for a patent; that his petition had been referred to the solicitor-general; that the solicitor-general had required and allowed the title of the said invention to be amended, as an invention for "improvements in the manufacture of cartridges and of wads or wadding for fire-arms," and given a certificate of allowance; and that the defendant, well knowing the premises, but maliciously intending to injure the plaintiff, and to prevent him from obtaining letters-patent for his said invention, falsely, fraudulently, maliciously, and wrongfully, and without any reasonable or probable cause, represented to the solicitor-general that he had an interest in opposing a grant of letters-patent to the plaintiff, and gave notice that he had applied for a patent and obtained provisional protection for an invention for "improvements in cartridges," and that, in consequence of the alteration in the title of the plaintiff's patent, he had reason to apprehend that such alteration in the title might admit of his invention being embraced in the plaintiff's patent; whereas, in truth, the alleged invention for which the defendant had obtained provisional protection was not his invention, but a fraudulent imitation of the plaintiff's invention, and the defendant had no interest in opposing a grant of letters-patent to the plaintiff.

There was a second count alleging that the defendant's knowledge of the plaintiff's invention was derived from a confidential communication thereof from the plaintiff, and that the defendant was seeking a patent in breach of such confidence: and the declaration concluded with a general allegation of special damage, that, by means of the premises, the solicitor-general refused to allow the plaintiff's application for letters-patent to proceed, and the plaintiff was thereby prevented from obtaining and failed to obtain a patent for his said invention, and was put to expense in opposing a grant of letters-patent to the defendant, &c. :—

Held, that the special damage alleged did not naturally flow from the grievances charged in the first count, and that without it the count disclosed no cause of action.

1854.

HADDAN

v.

LOTT.

thereinafter mentioned, the plaintiff was the first and true inventor of certain new manufactures, to wit, of "improvements in the manufacture of fire-arms, also of cartridges, of priming, and of wads or wadding for fire-arms," and had, after the Patent-Law Amendment Act, 1852,—15 & 16 Vict. c. 83,—had commenced and taken effect, before the committing of the said grievances, duly petitioned Her Majesty for Her royal letters-patent for the sole use and exercise of the said invention in and throughout the united kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, for the term of fourteen years, pursuant to the statutes in that case made and provided, and had, before the committing of the said grievances, left at the office of the commissioners of patents for inventions the said petition and the declaration required to accompany the same, and a provisional specification, signed by or on behalf of the plaintiff, describing the nature of the said invention according to the form of the statute in such case made,—which application and provisional specification of the plaintiff had been referred by the said commissioners to Her Majesty's solicitor-general for England for the time being, according to the said statute; and the said solicitor-general, having required and allowed the title of the said invention to be amended, as an invention for "improvements in the manufacture of cartridges, and of wads or wadding for fire-arms," and being satisfied that the said provisional specification described the nature of the said invention as amended, had allowed the same as amended, and had given a certificate of his said allowance, which certificate had been duly filed in the office of the said commissioners, according to the form of the statute; and thereupon the plaintiff had given due notice at the office of the said commissioners of his intention of proceeding with his application for letters-patent for the said invention, and his said application

had been duly advertised by the said commissioners :
 That thereupon, afterwards, the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to prevent him from obtaining letters-patent for his said invention, falsely, fraudulently, deceitfully, maliciously, wrongfully, and without any reasonable or probable cause, pretended and represented to the said solicitor-general that he had an interest in opposing a grant of letters-patent to the plaintiff for the said invention, and falsely, fraudulently, deceitfully, wrongfully, maliciously, and without any reasonable or probable cause, wrote and published to the said solicitor-general and others, of the plaintiff, and of his said invention, the words following, that is to say,—
 “ I, Frederick Lott, of &c. (meaning the defendant), do hereby give notice that I object to the grant of letters-patent to John Coope Haddan, of &c., civil engineer (meaning the plaintiff), for the invention of improvements in the manufacture of cartridges and of wads or wadding for fire-arms (meaning the said invention), as set forth in his petition recorded in the office of the commissioners of patents for inventions on the 26th of April, 1853, and my objections to the grant of such letters-patent are as follows,—that I (meaning the defendant) have applied for a patent, and obtained provisional protection for an invention (meaning an invention of the defendant) for improvements in cartridges; and the said John Coope Haddan (meaning the plaintiff) having also previously applied for a patent for ‘improvements in the manufacture of fire-arms, also of cartridges, priming, and of wads or wadding for the same fire-arms,’ provisional protection was allowed for the same, but the title of the said J. C. Haddan’s patent having been subsequently altered to ‘improvements in the manufacture of cartridges, and of wads or wadding for fire-arms,’ I have reason to apprehend that such alteration of the

1854.

HADDAN

v.
LOTT.

1854.

HADDAN

v.
LOTT.

title may admit of my invention being embraced in the said J. C. Haddan's patent ;" whereas, in truth and in fact the said invention for which the defendant had applied for a patent, and obtained provisional protection, was not the invention of the defendant, nor was the defendant in any way an inventor thereof, but the same was the invention of the plaintiff, and a part of the same invention for which the plaintiff had applied for letters-patent as aforesaid, and the plaintiff, and not the defendant, was the true and first inventor of the invention so claimed by the defendant as aforesaid, and the invention which the defendant claimed as his, as aforesaid, had been fraudulently imitated and taken by him from the said invention of the plaintiff,—all which the defendant then and always well knew ; and whereas, in truth and in fact, the plaintiff never had applied for a patent for "improvements in the manufacture of fire-arms, also of cartridges, of priming, and of wads or wadding for the same fire-arms," as the defendant then and always well knew ; and whereas, in truth and in fact, the defendant never had any interest in opposing a grant of letters-patent to the plaintiff for the said invention of the plaintiff, as he the defendant then and always well knew.

Second count.

The second count stated, that, the plaintiff, being the first and true inventor of the said manufacture, had, before the making of the promise thereafter mentioned, petitioned Her Majesty for letters-patent as aforesaid, and had, before the making of the said promise, left at the office of the commissioners of patents for inventions the said petition, and the declaration required to accompany the same, and the said provisional specification as aforesaid : That the defendant was not in any way an inventor of any part of the said new manufacture so invented by the plaintiff, nor had he any knowledge of the same, or of any part thereof, except what he derived from the plaintiff, as thereafter mentioned,—of all

which premises the defendant had notice before and at the time of making the promise thereafter mentioned : That, afterwards, in consideration that the plaintiff, at the request and with the consent of the defendant, confidentially informed the defendant of his the plaintiff's said invention, and explained to him the same, and consulted him as to the manner of carrying out and executing the same, on the terms that the defendant would not abuse the confidence of the plaintiff, and would act faithfully and honestly towards the plaintiff with reference to the said communication, and would not claim any part of the said invention so communicated to him as his, the defendant's, own, unless the same was his, the defendant's, own invention, the defendant promised the plaintiff that he would not abuse the confidence of the plaintiff, and would act faithfully and honestly towards him with reference to the said communication, and would not claim any part of the said invention so communicated to him as his, the defendant's, own, unless the same was his, the defendant's, own invention : nevertheless, the defendant, after the making the said promise, did abuse the confidence of the plaintiff, and acted unfaithfully and dishonestly towards the plaintiff with reference to the said communication, and did claim a part of the said invention so communicated to him as aforesaid as his, the defendant's, own, the same not being in any respect the defendant's own invention, in this, to wit, that, in breach of his said promise, he did represent and pretend to Her Majesty that he, the defendant, was the inventor of a part of the said invention of the plaintiff, and which the plaintiff had so communicated to the defendant as aforesaid, to wit, the invention of the plaintiff as to improvements in the manufacture of cartridges, and which the defendant described as improvements in cartridges, but which was not in any respect his, the defendant's, own invention,

1854.

HADDAN
v.
LOTT.

1854.

HADDAN
v.
LOTT.

and did upon such representation then petition Her said Majesty for letters-patent for the sole use and exercise of such his, the defendant's, pretended invention by himself, the defendant, in and throughout the united kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, for the term of fourteen years, and did, in further breach of his said promise, leave at the office of the said commissioners a provisional specification of his said pretended invention, in which he described and claimed as his, the defendant's, invention the said part of the said invention of the plaintiff: That the said application and provisional specification of the plaintiff having been referred by the said commissioners to Her Majesty's solicitor-general for England, according to the said statute, and the said solicitor-general having required and allowed the title of the plaintiff's said invention to be amended, as an invention for "improvements in the manufacture of cartridges, and of wads or wadding for fire-arms," and being satisfied that the said provisional specification of the plaintiff described the nature of his said invention as amended, allowed the same as amended, and gave a certificate of his allowance, which certificate was duly filed in the office of the said commissioners, according to the form of the said statute, and thereupon the plaintiff gave due notice of his intention of proceeding with his application for letters-patent for the said invention, and his said application was duly advertised by the said commissioners: That the defendant did afterwards, in further breach of his said promise, pretend and represent to the said commissioners, and to the said solicitor-general, that he had an interest in opposing the grant of letters-patent to the plaintiff, for his, the plaintiff's, said invention, on the ground and pretence that he was the inventor of the said part of the plaintiff's said invention which had been so communicated to the defendant as aforesaid, and for which he

had applied for letters-patent as aforesaid, and did, in further breach of his said promise, oppose before the said commissioners, and before the said solicitor-general, the grant of letters-patent to the plaintiff for his, the plaintiff's, said invention, on the ground and pretence aforesaid.

1854.

HADDAN
v.
LOTT.

"By means of which several premises respectively in this declaration aforesaid, the said solicitor-general refused to allow the plaintiff's application for letters-patent to proceed, and the plaintiff was thereby prevented from obtaining, and failed to obtain, letters-patent for his said invention, and divers expenses which he incurred in applying for such letters-patent have become and are useless to him, and he lost divers profits he might and otherwise would have derived from the said letters-patent for his said invention and the said part thereof claimed by the defendant as aforesaid, and he was also put to expense in opposing the grant of letters-patent to the defendant for the said invention, in which opposition he succeeded; and the plaintiff was and is by means of the premises otherwise injured: And the plaintiff claims 1000*l*."

General allegation of damage.

The defendant pleaded to the first count,—first, not guilty,—secondly, to the supposed grievances in the first count mentioned, so far as the same related to the defendant's having, as in the first count alleged, pretended and represented to the solicitor-general that he, the defendant, had an interest in opposing a grant of letters-patent to the plaintiff for the said invention, that, after the passing of the Patent Law Amendment Act, 1852, and before the time of the committing of the said supposed grievances in the first count mentioned, the defendant had applied by petition to Her said Majesty for the grant unto him, the defendant, of letters-patent for an invention of, to wit, "improvements in cartridges," and had caused the said petition for the

Pleas to the first count.

1854.

HADDAN
v.
LOTT.

grant of such letters-patent, together with the declaration of the defendant required to accompany the same, and a provisional specification signed by or on behalf of the defendant, and describing the nature of the said invention, to be left at the office of the commissioners of patents: that the said application and provisional specification were thereupon duly referred to Her said Majesty's said solicitor-general, who allowed such provisional specification, and gave a certificate of his allowance thereof, which was duly filed in the office of the said commissioners, and thereupon the said invention became provisionally protected, and the defendant became and was entitled unto the provisional protection of the said invention, according to the said statute: that, afterwards, and during the continuance of the said provisional protection, and after such alteration in the said title of the said supposed invention of the plaintiff as in the first count mentioned, he, the defendant, apprehending that such last-mentioned title might admit of the defendant's said invention for which he had so applied for letters-patent as aforesaid, being embraced in the letters-patent for which the plaintiff had applied, as in the said first count mentioned, did afterwards, and during the continuance of the said provisional protection, cause to be left at the place, to wit, the office of the said commissioners, and within the time, and in the manner, described by the regulations made by the said commissioners in that behalf, particulars in writing of his, the defendant's, objections to the said application of the plaintiff, and afterwards, and during the continuance of the said provisional protection to which the defendant became so entitled as aforesaid, and before the committing of the said supposed grievances, the said provisional specification of the plaintiff, and the defendant's said particulars of objections to the said application of the plaintiff, were duly referred to the said solicitor-

general, and afterwards, during the continuance of the said provisional protection, the matters of the said application of the plaintiff, and the defendant's said objections and opposition to the same, came on to be heard, and were heard by and before the said solicitor-general, whereupon he, the defendant, did then represent and state to the said solicitor-general, that he, the defendant, had an interest in opposing the said application of the plaintiff, to wit, for a grant of letters-patent to the plaintiff as in the declaration mentioned, as it was lawful for him, the defendant, to do, for the cause aforesaid.

The defendant also demurred to the first count, on the ground that it did not shew any cause of action. Joinder.

To the second plea, the plaintiff replied that the invention for which the defendant had applied by petition to Her said Majesty as in the said second plea mentioned, was a part of the plaintiff's said invention as in the said first count mentioned; and that the defendant was not in any sense the true and first inventor thereof, but had derived his knowledge thereof from the plaintiff, after he, the plaintiff, had applied for letters-patent as in the said first count mentioned, as he, the defendant, before and when he applied for such letters-patent, and during and at all and every of the times of the several transactions and matters in the said second plea mentioned well knew; and that the defendant did not apply for such grant of letters-patent to him, the defendant, as in the said second plea mentioned, until after the plaintiff had applied for letters-patent as in the said first count mentioned; and that the defendant's said application for letters-patent, and his several proceedings in the second plea mentioned, were respectively made and taken by him in fraud of the plaintiff, and for the purpose of depriving him, the plaintiff, of that which was, and which the defendant knew to be, a part of his

1854.

HADDAN
v.
LOTT.

Demurrer to
the first count.

Replication to
the second plea.

1854.

HADDAN

v.

LOTT.

Rejoinder and
demurrer.

said invention, and of which the plaintiff, and the plaintiff alone, was the true and first inventor, as the defendant before and at the said several times in the second plea mentioned well knew.

The defendant took issue on the above replication, and also demurred thereto on the ground that it was no answer to the second plea. Joinder in demurrer.

Hindmarch, in support of the demurrer. (a) The first count discloses no cause of action. The defendant had an interest in opposing the plaintiff's invention. The malicious assertion of a legal right affords no ground of action. [*Jervis*, C. J. The count alleges that the plaintiff obtained provisional protection for his invention by means of falsehood.] If so, it may be a slander of the plaintiff's title; and, if so, the first count is bad, for not setting out the words: *Gutsole v. Mathers*, 1 M. & W. 495; *Solomon v. Lawson*, 8 Q. B. 823. No action lies for words spoken in the course of a judicial inquiry: *Astley v. Younge*, 2 Burr. 807. The words that are set out are clearly not actionable in themselves without spe-

(a) The points marked for argument on the part of the defendant, were,—

"That the allegations in the first count respecting the defendant's representing that he had an interest in opposing a grant of letters-patent to the plaintiff, do not shew any cause of action against the defendant: That the first count does not shew that the plaintiff was deceived by such representation, and the plaintiff cannot recover upon such representation as being a slander of his title, because the words are not set out: That the words set out in the

first count are not slanderous, either as to the plaintiff or his alleged invention: That the first count cannot be supported, because the alleged representation and words which the defendant is alleged to have made and written, were made and written in and with reference to an official inquiry before the commissioners of patents and the solicitor-general.

"That the replication to the second plea does not support the declaration, and does not answer, or sufficiently answer, the second plea."

cial damage ; and none is alleged : *Kelly v. Partington*, 5 B. & Ad. 645. [*Jervis*, C. J. No doubt, in slander of title, a mere allegation of falsehood is not enough. It is the special damage that gives the right of action. The question is, whether the defendant having surreptitiously obtained a knowledge of the invention from the plaintiff, is not responsible for having maliciously represented to the solicitor-general that he was the true and first inventor, and so prevented the plaintiff from obtaining the alteration in the title which would make his patent available?] That is not the charge contained in this declaration. In *Ashley v. Harrison*, 1 Esp. N. P. C. 194 (256), it was held, that the proprietor of a place of public amusement cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from performing on the stage,—the damage being too remote.

1854.

HADDAN

v.

LOTT.

J. Brown, contra. (a) If this were an action for

(a) The points marked for argument on the part of the plaintiff, were,—

“That the first count shews a cause of action: that it shews that the defendant made a deceitful representation to the solicitor-general, whereby he deceived him, to the injury of the plaintiff, which is a cause of action: that it shews that the defendant maliciously, and without probable cause, opposed the plaintiff's letters-patent, and set up an opposing claim, to the plaintiff's damage, which is a cause of action: that it shews that the defendant acted in fraud of the Patent Law Amendment Act, 1852, to

the damage of the plaintiff, which is a cause of action: that it shews a cause of action for slander of title, followed by special damage: that the words by which the plaintiff's title was slandered, were set out: that the words set out are slanderous, having been published falsely and maliciously, and followed by special damage: that words published in, and with reference to, an official inquiry, being published falsely and maliciously, are actionable: that the words are alleged to have been published to the solicitor-general and others, and that it does not appear in the first count that they were

1854.

 HADDAM
 v.
 LOTTE.

slander of title, the words, no doubt, must be set out. This, however, is not a case of that sort. The distinction is expressly pointed out by Lord Abinger in giving the judgment of the court in *Gutsale v. Mathers*, 1 M. & W. 495, 503. "There may," he says, "be a class of cases where words are mixed up with the charge, to which this rule could not apply, as, in the ordinary case of an action for deceit by reason of a false representation of character, or where an action is founded on a deceitful representation to induce a party to advance his money: that is not properly an action for words. So, also, where a man defeats the object of another by claiming goods that do not belong to him, and does that falsely and maliciously: in such a case, it must be alleged that he did claim them as his own, and thereby defeated the plaintiff's object in respect of them; but the mere form of the words is not sufficient. Here, the complaint is for the act done." [*Williams, J. In Sheppard v. Wakeman*, 1 Lev. 53, 1 Sid. 79, which was an action against a man for *falsely and maliciously*, with intent to hinder a marriage between the plaintiff and a third person, writing to the intended husband,—

published in or with reference to an official inquiry, or solely in or with reference to an official inquiry, but it may be proved that they were published on other occasions.

"That the second plea is bad, and no answer to the part of the first count to which it is pleaded: that it neither denies nor excuses, nor justifies the falsehood, the fraud, the deceitfulness, nor the malice of the defendant's pretence and representation as to his interest in opposing the grant of the plaintiff's letters-patent, nor

does it shew any probable cause for his so doing: that it does not shew that the invention for which he had applied for letters-patent was his invention, or one for which he had any right or pretence of right to such letters.

"That the replication to the second plea is a sufficient answer to it, inasmuch as it shews that the defendant's application for letters-patent was fraudulent and improper, and one which he had no right to make."

"You ought not to marry her, for, before God she is *my* wife; and therefore if you do, you will live in adultery with her, and your children will be bastards,"—it was argued on behalf of the defendant, as it has been contended here, that it was a mere slander of title: but the court held, that the gist of the action was the malice and the special damage.] In *Gerard v. Dickenson*, 4 Co. Rep. 18. a.,—which was cited in *Sheppard v. Wakeman*,—in an action for slander of title, the plaintiff declared that he was in treaty with J. S. for a lease of the manor of A. at so much rent, and that the defendant, knowing of the treaty, published these words,—“I have a lease of the manor of A. for ninety-nine years,” and published a lease for ninety years supposed to be made by one seised of the same manor before the plaintiff’s purchase thereof, to E. D. her late husband, and offered to sell it: whereas, in truth, the defendant knew it to be forged; by reason whereof the said J. S. did not proceed in the treaty for the lease. The defendant by her plea traversed that she knew the lease to be a forgery. And, upon demurrer, it was held, that the action lay, because it was alleged that the defendant knew of the treaty for a lease to J. S., and that the lease which she published as a good lease was a counterfeit one, by which the treaty was broken off. *Green v. Button*, 2 C. M. & R. 707, confirms *Gerard v. Dickenson*. Parke, B., there says: “This is in substance an action on the case for a false and malicious representation; and there is no doubt, on the authority of *Gerard v. Dickenson*, which has been cited, and also of *Lovett v. Weller*, 1 Roll. Rep. 309, that the action is maintainable, though the defendant makes a claim of right, if it be made maliciously and without reasonable or probable cause, and the special damage accrues from the claim so made.” In that case the words were not set out. *Barley v. Walford*, 9 Q. B. 197, has a curious analogy to the present case.

1854.

HADDAN
v.
LOTT.

1854.

HADDAN

v.

LOTT.

There, a declaration in case stated, that the plaintiff was a printer of silk goods, and had delivered to the defendant a lot of goods, in which were woven fabrics of silk printed by the plaintiff with a design for the ornamenting of them which had been published by the plaintiff to the defendant and others; and the plaintiff was about to print other fabrics of silk with the same design, and to publish the same in the way of his trade, for gain,—of all which the defendant had notice: but the defendant, contriving to deceive, injure, and defraud the plaintiff, and to induce him to desist from printing more with the design, and to deprive him of the gains he would have made, *and to cheat him of the benefit of the design, and to acquire the same for the sole benefit of the defendant*, and to put the plaintiff to expense, falsely, fraudulently, and deceitfully represented to the plaintiff, that, in the lot, there was a copy of a registered pattern (a), and that, the parties having asked the defendant for the printer, the defendant was obliged to give the plaintiff's name, and the parties intended to proceed against the plaintiff by injunction and order through the court of Chancery (thereby meaning that the design was a copy of a design which had been registered, and the copyright in which was subsisting, according to the statute respecting copyright of designs, and that the parties interested in the design had asked the defendant who was the printer, and the defendant had been obliged to give the plaintiff's name as printer, and the parties intended to proceed against the plaintiff, to prevent him from pirating the design, by injunction and order through the court of Chancery); whereas, in truth, no such design, or design resembling it, had been registered according to the statute aforesaid; and there were no parties interested in the design; nor had any parties asked the defendant for

(a) See the 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65.

the printer; nor had the defendant given them the plaintiff's name; nor did any parties intend to proceed against the plaintiff by injunction, &c.; as the defendant at the time of making the representation knew: by means of which representation, the plaintiff, believing it to be true, was induced to travel a long distance for the purpose of inquiring into the matters represented, and satisfying the supposed parties, as it was reasonable for him to do under the circumstances, and was induced to abstain from further printing with the design, which he had orders to do, and from selling handkerchiefs printed with the design; and the defendant, by means of the premises, enjoyed the benefit of the design, to the exclusion of the plaintiff, and printed with the design, and sold for his profit, silk handkerchiefs, and took the profits, without the competition of the plaintiff, and to his exclusion. And it was held, on general demurrer, that the declaration shewed a cause of action,—it appearing that the defendant had knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit, or to acquire it to himself, and the damage naturally flowing from the plaintiff's belief. It was objected in that case that the words of the representation were not set out; but the objection was not allowed. Whether the representation be made to the plaintiff or to a third party, is immaterial, if it is false to the knowledge of the defendant, and made for the purpose of injury to the plaintiff or gain to himself, and the damage naturally flows from it. It is said that the action will not lie, because the alleged misrepresentation occurred in a judicial proceeding. That only aggravates the damage the plaintiff has sustained: there is no appeal against the decision of the solicitor-general in withholding a patent. [*Jervis*, C. J. There is nothing in that case to give the Lord Chancellor jurisdiction.] The proceeding before the solicitor-general wants several of the ingredients of

1854.

HADDAN
v.
LOTT.

1854.

HADDAN
v.
LOTT.

a judicial proceeding: there is no public hearing, no power to compel the attendance of witnesses. [*Williams, J.* The difficulty I feel is this. If your argument be well founded, that this case falls within the general rule applicable to damage arising from a false and malicious representation, how is the special damage here alleged the necessary consequence of the thing complained of?] The plaintiff's complaint is, that, he having taken the necessary preliminary steps to obtain a patent with an amended title, the defendant comes before the solicitor-general, and fraudulently and maliciously represents to him that the title of the plaintiff's patent as amended may include an invention for which he has obtained provisional protection, in consequence of which the solicitor-general refuses to grant a fiat for a patent to the plaintiff. [*Williams, J.* The defendant avails himself of a clause in the Patent-Law Amendment Act, 15 & 16 Vict. c. 83, s. 12, which enables any person having an interest in opposing the grant of letters-patent for an invention to state their objections: and the solicitor-general in consequence withholds his fiat.] We complain that it is done maliciously. [*Crowder, J.* In order to sustain the first count, you must shew that the special damage is made out.] If the special damage alleged *may* have resulted from the act complained of, it is a question for the jury. It is not usual to repeat the special damage at the end of each count. An instance of an action of this mixed character is to be found in *Newman v. Zachary*, Aleyn, 3. The plaintiff declared that the defendant was his shepherd, and that two of his sheep did stray, one of which being found again, the defendant affirmed to be the plaintiff's, whereupon the plaintiff paid for the feeding of it, and caused it to be shorn and marked with his own mark; and yet afterwards the defendant "malitiose machinans" to disgrace the plaintiff, and knowing the said sheep to be the plaintiff's, falso et

fraudulenter affirmavit to the bailiff of the manor that had waifs and strays belonging to it, that this sheep was an estray; whereupon the bailiff seized it,—to his damage, &c. And after verdict for the plaintiff, it was moved “that there was no cause of action; for, there is no breach of trust in the defendant as shepherd, and his words cannot endamage the plaintiff, for, he shall have his remedy against the bailiff of the manor that seized the sheep wrongfully.” But it was adjudged that the action would lie, “because the defendant by his false practice hath created a trouble, disgrace, and damage to the plaintiff; and, though the plaintiff have cause of action against the bailiff, yet this will not take off his action against the defendant in respect of the trouble and charge that he must undergo in the recovery against the bailiff:” and Hales, J., said, that, “if one slander my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, I shall have an action against him that caused the disturbance.” [*Jervis*, C. J. If this were a case of a purely judicial proceeding, would it not be necessary to allege that the proceeding terminated in favour of the party complaining?] No doubt it would. See the notes to *Vicars v. Wilcocks*, 8 East, 1, in 2 Smith’s Leading Cases, 302—305. Here the declaration avers that the defendant’s alleged invention is in fact the same invention as the plaintiff’s, and that the defendant stole it from the plaintiff. In *Chapman v. Pickersgill*, 2 Wils. 145, which was an action on the case for falsely and maliciously suing out a commission of bankruptcy which was afterwards superseded, the Lord Chief Justice De Grey says: “Upon the arguing of this case, the first objection was, that this action will not lie, there being a remedy given by statute (a); that a pro-

1854.

HADDAN
v.
LOTT.

(a) 5 G. 2, c. 30.

1854.

HADDAN
v.
LOTT.

ceeding on a commission of bankruptcy was a proceeding in nature of a civil suit; and that no action of this sort was ever brought. But we are all of opinion that this action is maintainable. The general grounds of this action are, that the commission was *falsely* and *maliciously* sued out, that the plaintiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a supersedeas to the commission. Here is *falsehood* and *malice* in the defendant, and great wrong and damage done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a *false* and *malicious* prosecution, it is most reasonable he should have an action to repair himself. See *Roberts v. Savill*, 5 Mod. 407, 1 Salk. 13, 3 Salk. 16, Carth. 416, 1 Lord Raym. 374, 12 Mod. 210; *Jones v. Gwynn*, 10 Mod. 214. I take these to be two leading cases, and it is dangerous to alter the law. See also *Robins v. Robins*, 12 Mod. 273; *Bulwer's Case*, 7 Co. Rep. 1; Roll. Abr. *Action sur Case* (H); *Hocking v. Matthew*, 1 Vent. 86, 1 Sid. 463. But it is said this action was never brought: and so it was said in *Ashby v. White*, 2 Lord Raym. 938, 1 Salk. 19, 3 Salk. 17, Holt, 524, 6 Mod. 45, 1 Smith's Leading Cases, 105. I wish never to hear this objection again. This action is for a tort: torts are infinitely various, not limited or confined, for, there is nothing in nature but may be an instrument of mischief; and this of suing out a commission of bankruptcy *falsely and maliciously*, is of the most injurious consequence in a trading country." So, nothing can be more mischievous than *falsely and maliciously* to intercept from a man the just reward due for a valuable invention.

Hindmarch, in reply, referred to the Patent Law Amendment Act, 15 & 16 Vict. c. 83, ss. 7, 12, 13, 14, and 15; and submitted that the first count was entirely

framed on a false representation; and that the special damage alleged at the end of the declaration was not such as naturally flowed from the grievances complained of in the first count, and could not, if it did, be prayed in aid to shew a cause of action therein.

1854.

HADDAN
v.
LOTT.

JERVIS, C. J. I think it would be better to put the case on the record as it really exists. I do not think the special damage alleged at the end of the declaration flows naturally from the allegations in the first count.

Brown. It certainly is a very vague way of alleging it.

CROWDER, J. It is not alleged at all.

Brown prayed leave to amend.

Rule accordingly. (a)

(a) The declaration was afterwards amended, and the action compromised.

1854.

WILKINSON v. KIRBY.

In trespass for mesne profits, the defendant pleaded,—first, not possessed,—secondly, that, before the several times when &c., A. was seised in fee, and, on the 27th of December, 1846, demised the premises to B. for twenty-one years; that B. entered by virtue of that demise, and, on the 28th of January, 1847, demised to the defendant for

BY the first count of the declaration the plaintiff claimed “for money payable by the defendant to the plaintiff for the defendant’s use by the plaintiff’s permission of messuages and lands of the plaintiff.”

The second count charged that the defendant broke and entered a certain house of the plaintiff called and known as No. 36, Somerset Street, Portman Square, and continued therein, and detained the same from the plaintiff, for a long space of time, whereby the plaintiff was during all such time deprived of the use and enjoyment thereof, and was put to great expense in recovering the possession of the said house, and otherwise: and the plaintiff claimed 150*l*.

The defendant pleaded,—thirdly, that the said house one year from the 25th of March then next, and so from year to year, &c., and that the defendant entered by virtue of the last-mentioned demise.

Replication (by way of estoppel), as to so much of the pleas as related to the trespasses complained of in the count since the 26th of October, 1853,—that the plaintiff on that day sued out a writ of ejectment for the recovery of the premises in question (setting out the writ); that Emily Kirby in the said writ mentioned was the defendant in this action, and was at the time of the issuing of the said writ the tenant in possession of the premises in question; that the premises in the said writ and in this action were the same, and that the plaintiff in the said writ named was the now plaintiff; that no appearance was entered or defence made to the said writ; that, after the issuing of the said writ, and whilst the ejectment was pending, and in pursuance of the act of parliament in that behalf, the plaintiff, by the consideration and judgment of the court obtained possession of the said premises, &c.; that the said judgment was still in force; and that, afterwards, and before the commencement of this suit, and by virtue of the said judgment, the plaintiff entered into and upon the possession of the premises,—wherefore the plaintiff prayed judgment if the defendant ought to be admitted, against the said recovery, record, and proceedings, to plead the said pleas, or either of them, as to the trespasses in the count complained of since the said 26th of October, 1853:—

Held, on demurrer, a good replication by way of estoppel to both pleas; that it was not necessary to aver notice to the defendant of the proceedings in the ejectment, or the issuing or execution of a writ of possession.

Held also, that if it were necessary, the replication contained a sufficient averment of entry by the plaintiff.

Held also, that the plaintiff’s title by estoppel related back to the date of the writ of ejectment, and would be presumed to continue until shewn by rejoinder to have been determined.

in the last count mentioned, was not, at the said several times when &c., or any of them, the house of the plaintiff, in manner and form as the plaintiff had in the said last count alleged.

1854.

WILKINSON
v.
KIRBY.

Fourthly, that, before the said several times when &c. in the last count mentioned, one George Wilkinson was seised in his demesne as of fee of the said house in the last count mentioned, and, being so thereof seised, afterwards and before the said several times when &c. in the said last count mentioned, and each of them, to wit, on the 27th of October, 1846, by a certain indenture then made between the said George Wilkinson of the one part, and Hester Phelps Thomas of the other part,—which said indenture was sealed with the seal of the said George Wilkinson, and with the seal of the said Hester Phelps Thomas,—the said George Wilkinson did demise and lease unto the said Hester Phelps Thomas the said house in the said last count mentioned, from the 29th of September then last past, for the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended: that, by virtue of the said demise, the said Hester Phelps Thomas afterwards, and before any of the said times when &c., entered into and upon the said house, and became and was possessed thereof for the said term so to her thereof granted as aforesaid: that, afterwards, and while the said Hester Phelps Thomas was so possessed as aforesaid, and before the expiration of the said term so to her granted as aforesaid, and before any of the said times when &c. in the said last count mentioned, to wit, on the 28th of January, 1847, the said Hester Phelps Thomas demised the said house in the said last count mentioned to the defendant, to have and to hold the same to the defendant from the 25th of March next after the day and year last aforesaid, for the term of one year then next following and fully to be complete and ended, and so from year to year for

1854.

WILKINSON

v.

KIRBY.

so long a time as the said Hester Phelps Thomas and the defendant should respectively please: that, by virtue of the said last-mentioned demise, the defendant afterwards, and before any of the said times when &c. in the said last count mentioned, and before the expiration of the said term so to the said Hester Phelps Thomas granted as aforesaid, entered into and upon the said house in said last count mentioned, and became and was possessed thereof for and during and upon the tenancy so created as last aforesaid: that afterwards, by virtue of the tenancy so created as last aforesaid, the defendant did, at the said several times when &c., and before the expiration or determination of the said term to the said Hester Phelps Thomas granted as aforesaid, and before the expiration or determination of the said tenancy of the defendant, and during the continuance thereof, enter into and upon the said house in the said last count mentioned, in and upon the plaintiff's alleged possession thereof, as she lawfully might for the cause aforesaid; and because the said term so to the said Hester Phelps Thomas granted as aforesaid, and the said tenancy of the defendant had not been determined or ended, but continued and were in full force and effect at and during all the times in the said last count mentioned, and the defendant did at and during all those times continue in the said house, and detain the same from the plaintiff, as she lawfully might for the cause aforesaid: and that the said several trespasses and wrongs in that plea mentioned and justified, were the several trespasses and wrongs in the said last count mentioned.

Replication.

Replication,—as to so much of the third and last pleas as related to the trespasses complained of in the last count of the declaration since the 26th of October, 1853,—that the defendant ought not to be admitted to plead the said third and last pleas, or either of them, as to the said trespasses complained of since such time, because the

plaintiff said, that, on the day and year last aforesaid, for the purpose of the plaintiff's recovering the possession of the said house in the said last count mentioned, a writ of our lady the Queen issued forth of the court of Common Pleas at Westminster, in these words, that is to say,—“ Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the faith, to Hester Phelps Thomas, Emily Kirby, and all persons entitled to defend the possession of all that messuage or tenement situate and being No. 36, on the south side of Somerset Street, Portman Square, in the parish of St. Mary-le-bone, in the county of Middlesex, to the possession whereof George Wilkinson claims to be entitled, and to eject all other persons therefrom, these are to will and command you or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our court of Common Pleas at Westminster, to defend the said property, or such part thereof as you may be advised; in default whereof, judgment may be signed and you turned out of possession. Witness, Sir John Jervis, Knight, at Westminster, the 26th day of October, 1853 :” and the plaintiff further said that the said Emily Kirby in the said writ mentioned was the defendant in the declaration in the action mentioned, and was at the time of the issuing of the said writ the tenant in possession of the said house in the last count of the declaration mentioned : that the said messuage or tenement in the said writ mentioned is and was the said house in the said last count mentioned, and that George Wilkinson in the said writ mentioned was the plaintiff in the declaration in this action mentioned : that no appearance was entered or defence made to the said writ : that, after the issuing of the said writ, and whilst the said action of ejectment thereby-commenced was pending in the said court of Common Pleas, and in pursuance of the act of parliament in that behalf, such proceedings were there-

1854.

WILKINSON
v.
KIRBY.

1854.
WILKINSON
v.
KIRBY.

upon had in the said court of Common Pleas at Westminster, in such action of ejectment, that afterwards, and before the commencement of this suit, the plaintiff, by the consideration and judgment of the said court of Common Pleas, recovered possession of the said house in the last count mentioned, with the appurtenances,—as by the record and proceedings thereof still remaining in the said court of Common Pleas more fully and at large appeared; which said judgment was still in full force and effect: and that afterwards, and before the commencement of this suit, and by virtue of the said judgment, the plaintiff entered into and upon the possession of the said house, with the appurtenances, and became and was thereof possessed; wherefore the plaintiff prayed judgment if the defendant ought to be admitted, against the said recovery, record, and proceedings, to plead the said third and last pleas, or either of them, as to the trespasses complained of in the last count since the said 26th of October, 1853.

Joinder of issue
and demurrer.

The defendant joined issue on the replication to so much of the third and last pleas as related to the trespasses complained of in the last count since the 26th of October, 1853, and also demurred generally thereto,—the grounds of demurrer noted in the margin, being, “that the said replication is bad in substance, because it is pleaded in estoppel to so much of the third and last pleas as related to the trespasses in the last count mentioned committed since the 26th day of October, 1853, and contains no matter which operates in law as an estoppel thereto, or as an estoppel thereto to the extent to which the plaintiff relies upon it as such in his said replication, and it does not appear in or by the said replication that the defendant is estopped or precluded from averring the truth of the matters contained in the said pleas, so far as they relate to the said trespasses, or so far as they relate to the whole of such trespasses.”

The plaintiff joined in demurrer.

Deighton, in support of the demurrer. (a) The record does not shew that the plaintiff had such a possession as

1854.

WILKINSON

v.
KIRBY.

(a) The points marked for argument on the part of the defendant, were as follows:—

"1. That the replication contains no matter which operates in law to estop the defendant from averring the truth of the matters alleged in the third and last pleas respectively:

"2. That the replication contains no matter which estops the defendant from averring the truth of the matters alleged in the third and last pleas respectively:

"3. That it does not appear by the replication that the defendant ever had notice of, or was duly served with a copy of, the writ in the replication mentioned, or ever had notice of, or was in any way party to, the proceedings therein mentioned:

"4. That it does not appear by the replication that the matters alleged in the said third or last pleas, or either of them, were adjudged upon or in issue by or in the proceedings mentioned in the said replication, or that those proceedings estop the defendant from averring that the plaintiff's possession, as alleged in the declaration, was not such a possession as entitles him to maintain this action against the defendant:

"5. That it does not appear that the proceedings in the replication mentioned were taken in pursuance of or according to,

or were warranted by, the provisions of the statute in the replication mentioned:

"6. That it does not appear that the relation of landlord and tenant existed between the said Hester Phelps Thomas in the last plea mentioned and the plaintiff, or between the defendant and the plaintiff, or that one half-year's rent was in arrear at the time the said writ and proceedings in the said replication were issued, served, or taken:

"7. That, the plaintiff having taken issue on the matters alleged in the third plea, and having pleaded in bar to the matters in the last plea, cannot be admitted to plead in estoppel to any of those matters:

"8. That the last plea is pleaded to certain trespasses therein mentioned, none of which can be inferred from the said plea to have been committed since the 26th of October, 1853; and that the replication is therefore improperly pleaded to such plea, and contains no matter which estops the plaintiff from averring the truth of the matters in that plea, so far as they are a justification of the trespasses which that plea is pleaded to.

"9. That the replication is bad in substance, and affords no answer to any of the matters to which it is replied."

1854.

 WILKINSON
 v.
 KIRBY.

to entitle him to maintain trespass. It is not enough to shew title: the plaintiff should shew actual possession. This record shews no more than a title to the possession on and after the 26th of October, 1853. [*Jervis*, C. J. We decided in *Matthew v. Osborne*, antè, Vol. XIII, p. 919, in conformity with *Doe v. Wright*, 10 Ad. & E. 763, 2 P. & D. 672, that a recovery in ejectment between the same parties might be replied by way of estoppel to a plea of not possessed. *Doe v. Wright* is an express authority that it may be so pleaded.] As against a tenant in possession who has pleaded; but not as against one who has suffered judgment by default. That is mentioned as a matter of doubt in *Doe v. Wellsman*, 2 Exch. 369. In that case, to a declaration in trespass for mesne profits, stating the entry and expulsion on the 10th of December, 1844, and the expulsion and taking of profits to have been continued till the 10th of March, 1846, the defendant pleaded that the closes in which &c. were not, nor were any of them, or any part thereof, the plaintiff's, modo et formâ. The plaintiff replied to the whole plea, by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment stating the demise to have been on the 14th of October, 1845, for a term of twenty years; and the replication concluded with a prayer of judgment if the defendant during that term ought to be admitted against the said recovery, record, and proceeding, to plead that plea: and it was held, on special demurrer, that the replication applied only to part of the time of the trespass complained of in the declaration, and was therefore bad. There is no averment of service of the writ on the defendant, or that she had any notice to appear. It does not follow, that because the plaintiff has a sufficient title to maintain ejectment, he may also bring trespass for mesne profits. [*Jervis*, C. J. Since the case of *Doe v. Huddart*, 2 C. M. & R. 316, it has been generally laid

down, that, where there is judgment by default in ejectment, the plaintiff may maintain trespass for the mesne profits.] In *Jefferies v. Dyson*, 2 Stra. 960, it was held, that, where judgment is against the casual ejector, the title may be gone into in an action for mesne profits. (a) Here, no writ of possession is stated, no entry shewn. [*Jervis*, C. J. Yes they are. *Maule*, J. The plaintiff alleges certain matters of fact which estop the defendant,—a recovery in ejectment, and an entry in pursuance thereof.] There is no authority to shew that a mere act of the party can operate as an estoppel. [*Maule*, J. The nature of an estoppel is not an assertion of right by the party pleading it, but a denial of the right of the other party to make the assertion or the defence attempted. Do you say that estoppel must be exclusively matter of record?] Yes. There is no other way of claiming title by estoppel. [*Maule*, J. This is not a setting up of title by estoppel.] In Co. Litt. 352. a., Lord Coke says: “Touching estoppels, which is an excellent and curious kind of learning, it is to be observed that there be three kinds of estoppels, viz. by matter of record, by matter in writing, and by matter in pais. By matter of record, viz. by letters-patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. By matter in writing, as, by deed indented, by making of an acquittance by deed indented or deed-poll, by defeasance by deed indented or deed-poll. By matter in pais, as, by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate, as here in the case that Littleton putteth; whereof Littleton maketh a special observation, that a man shall be estopped by matter in the country, without any writing. To make the reader more capable

1854.

 WILKINSON
 v.
 KIRBY.

(a) But see *Decosta v. Atkins*, Bull. N. P. 87; *Astlin v. Parkin*, 2 Burr. 665.

1854.

 WILKINSON
 v.
 KIRBY.

of the learning of estoppels, these few rules, amongst others, are to be known,—first, that every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel,” &c. Here, the record does not shew possession: the estoppel cannot be relied on as an estoppel in pais, because it is only the act of one party. [*Jervis*, C. J. Where the matter is contested, the mere recovery is enough. No writ of possession is necessary, where the tenant abandons the contest, and lets judgment go by default.] This is only matter of evidence. [*Maule*, J. This is not *only* evidence. Suppose the plaintiff wants to shew a possessory title in him,—would it not be enough for him to shew an ejectment brought, a judgment by default, and an entry made under that judgment? Could you answer that by saying that it is only pleading matter of evidence?] The entry might be traversed. But it is submitted that it is not competent to a party to rely on any matter as an estoppel which consists simply of an act done by him. [*Maule*, J. This is not simply an act done. The plaintiff institutes proceedings in ejectment to recover land of which the defendant is in possession, and recovers judgment and enters upon the land, the defendant being a party to the ejectment.] The facts alleged do not amount to an estoppel: the mere act of a party cannot be relied on as an estoppel in any way. In Buller’s *Nisi Prius*, p. 87, the distinction is taken between a judgment after verdict, and a judgment against the casual ejector:—“In trespass against the tenant in possession, for mesne profits, either by the lessor or the nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; but it is sufficient to produce the judgment in ejectment, *and the writ of possession executed*, and to prove the value of the profits, and thereupon he shall recover from the time

of the demise laid in the declaration : *Astlin v. Parkin*, 2 Burr. 665, Barnes, 472. Where the judgment was against the tenant in possession, and the action of trespass is brought against him, it seems sufficient to produce the judgment without proving the writ of possession executed, *because, by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee*, so that either may maintain trespass without proving an actual entry ; but *where the judgment was against the casual ejector, and so no rule entered into*, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed : *Thorp v. Fry*." [Jervis, C. J. It was always considered—until *Doe v. Huddart*, 2 C. M. & R. 316, decided otherwise,—that a judgment in ejectment, and writ of possession or entry, were conclusive evidence of the plaintiff's title, by estoppel, in an action for mesne profits, without pleading it.] *Smartle v. Williams*, 1 Salk. 245, 3 Lev. 387, Holt, 478, Comb. 247, and *Litchfield v. Ready*, 5 Exch. 939, shews that a mere allegation of entry is not enough. [Jervis, C. J. Where it can be pleaded, and is not, it is no estoppel. *Armstrong v. Norton*, 2 Irish Law Rep. 96, which is cited in the judgment in *Litchfield v. Ready*, is an authority against you. Parke, B., says,—“The court there held, that the judgment was not more than *primâ facie* evidence of the plaintiff's title ; but, as the new rules have not been introduced into those courts, the defendant is at liberty to enter fully into his defence under the general traverse of not guilty, and the matter is at large, and the plaintiff has no opportunity of replying the estoppel.” *Maule, J.* Where a man has an opportunity of pleading the estoppel, and does not plead it, he is bound : but not where he cannot plead it, as in ejectment.] That is so in the case of an estoppel by matter of record or by deed. [Maule, J. Is it not so of estoppel by

1854.

WILKINSON
v.
KIRBY.

1854.

WILKINSON

v.

KIRBY.

matter in pais?] No. [*Jervis*, C. J. What has the defendant to do with a writ of possession executed? Estoppel need not be all record. You admit, that, if, after the recovery in ejectment, the defendant had surrendered the possession, that would have done. What difference does a writ of possession make? In the one case the tenant is turned out; in the other, he goes out, he acquiesces in the judgment.] Then, if the judgment is to operate as an estoppel, from what time shall it so operate? [*Jervis*, C. J. From the day of the demise in the declaration, the 26th of October, 1853.] For what time is it to operate as an estoppel? [*Jervis*, C. J. The judgment estops the defendant from the 26th of October, 1853, until the entry by the plaintiff.] Suppose, after the entry, the plaintiff sells the property to a third person? [*Maule*, J. If the plaintiff can shew that the defendant is estopped from denying his possession as to part, the plea is a bad plea.] Since the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 75, the plea of not possessed may be taken distributively. [*Jervis*, C. J. You cannot have a verdict distributively on not possessed: the 75th section had in its contemplation cases of payment and set-off and the like, such as *Cousins v. Paddon*, 2 C. M. & R. 547, and *Tuck v. Tuck*, 5 M. & W. 109, where part of the cause of action is answered.] The replication so far as relates to the fourth plea is also bad on the ground that it is addressed to the trespasses after the 26th of October, 1853, whereas the plea is not limited to anything of the sort. The plaintiff should have new assigned: 1 Wms. Saund. 299, n. (6); *Scott v. Dixon*, 2 Wils. 3.

Prentice, contra. As to the suggestion that the estoppel is improperly set up for too long a time, it is enough to say that the replication follows the precedents in *Doe v. Huddart*, *Doe v. Wright*, and all the cases.

If anything has arisen subsequently to affect the plaintiff's right, that might come by way of rejoinder. The plea, if bad in point of law as to part, is bad altogether. The distributive provision in the Common Law Procedure Act has reference only to the course to be pursued at the trial. Since the cases of *Armstrong v. Norton*, 2 Irish Law Rep. 96, and *Litchfield v. Ready*, 5 Exch. 939, there can be no doubt that a judgment by default in ejectment could be pleaded as an estoppel. And now, by the Common Law Procedure Act, 15 & 16 Vict. c. 76, ss. 168, 170, judgment by default in ejectment stands precisely on the same footing as judgment by default in any other action. Both are now parties to the proceeding, and named in the writ, which was not the case in the old proceeding in ejectment. Then it is said that this is not matter of estoppel, because the allegation of entry does not appear to be by matter of record. It may well be doubted whether any allegation of entry at all was necessary, especially with reference to the fourth plea. If there is a judgment in ejectment which determines the title to the premises as between these parties, how can the defendant be allowed to say that the plaintiff is not entitled because there is an outstanding term? The effect of a plea of not possessed is now settled by the case of *Jones v. Chapman*, 2 Exch. 803, where it was held, that, under the plea to an action of trespass quare clausum fregit, that the close in the declaration mentioned was not at the time when &c. the close of the plaintiff, the defendant may shew a lawful right to the possession of the close either in himself or in some other person under whose authority he claims to have acted. [*Jervis*, C. J. It likewise negatives the title in point of fact.] *Litchfield v. Ready*, so far as it goes, is an authority for the plaintiff.

1854.

WILKINSON

v.

KIRBY.

Deighton, in reply. With regard to the presumption

1854.

WILKINSON

v.

KIRBY.

of the continuance of the plaintiff's title the 667th section of Littleton, and Lord Coke's commentary thereon, shew that nothing can be taken by inference in a plea of estoppel. No case has decided how a replication of this sort should be limited. The point was not made in *Doe v. Huddart*, or *Doe v. Wright*. [Cresswell, J. Lord Denman, in delivering the judgment in the last case, says,—"The defendant's argument proceeded on the assumption that it was necessary for the plaintiff to have actual possession at the time of bringing *this action*. And there are, no doubt, old authorities, not cited in the argument, which shew that the disseisee could not bring trespass with a continuando after the disseisin before re-entry, because the freehold was in the disseisor for the whole time after the disseisin; but that, after re-entry, he should have trespass with a continuando from the disseisin to the re-entry: but the same authorities state that for the *first* trespass and disseisin the action lay before re-entry; and they give several instances where the disseisee had lost his re-entry by the act of God or the determination of his estate, in which he had the action without re-entry. See Co. Litt. 257, a., and 2 Roll. Abr. 550, 553, 554. It seems to us, however, not important now to follow out this inquiry, because the question is, not to what extent the plaintiff can recover damages on his record,—as to which we say nothing,—but whether the plea of 'not possessed' must not, at all events, include the time at which the trespass charged was committed. We think it must, and therefore, being inconsistent, to that extent at least, with the judgment set out in the replication, the defendant is estopped from pleading it." That was not approved of by the court of Exchequer in *Doe v. Wellsman*.

JERVIS, C. J. I am of opinion that the replication in this case is good, and therefore that the plaintiff is en-

titled to judgment. The plaintiff declares in trespass for mesne profits, and complains that he has been kept out of possession by the defendant. The first plea, to which the replication is pleaded by way of estoppel, is the third, viz. not possessed. That plea now raises two classes of defence: it either denies a possession in fact in the plaintiff, which is necessary to support an action for a trespass; or the defendant may under it shew title in himself or in a third party. That point, after long discussion, was finally settled by the decision of the court of Exchequer Chamber, in *Jones v. Chapman*, 2 Exch. 803. The defendant, therefore, by her third plea professes to say either that the plaintiff was not possessed at all, or that somebody else had title. To this the plaintiff replies that the defendant ought not to be permitted to deny his title, because there has been an adjudication on the matter in an action between them which has determined the title. It is objected to this, on the part of the defendant, that that is not the effect of a judgment *by default* in ejectment. From the time, however, of *Astlin v. Parker*, 2 Burr. 665, down to *Doe v. Wright*, 10 Ad. & E. 763, 2 N. & P. 672, it has always been held that a judgment by default in an action of ejectment, followed by a writ of possession, even though not pleaded, is evidence of the title and possession of the plaintiff, as against the tenant in possession, from the day of the demise in the declaration: and, on the authority of the last-mentioned case, it is now well settled, that, if properly pleaded, it is an estoppel. It is urged by Mr. Deighton, that, at all events, the judgment cannot be pleaded as an estoppel unless followed by a writ of possession. But an entry in pais is as good for all purposes as a writ of possession executed and returned; and an entry in fact is sufficiently alleged here: and it is a mistake to say that matters of fact may not be pleaded by way of estoppel. The question is

1854.

WILKINSON

v.

KIRBY.

1854.
WILKINSON
v.
KIRBY.

not whether the defendant is estopped from denying these matters of fact; but whether, having admitted them, as she does by her demurrer, she is estopped from denying the plaintiff's possession. I doubt whether it was even necessary, as to the third plea, to state any entry. Under that plea, the defendant *might* prove title in a third party during the whole period covered by the declaration: but it is clear that the plaintiff was entitled to the possession for a portion of that time, viz. from the 26th of October, 1853, till the entry; that was determined by the judgment in the ejectment. As, therefore, the defendant could not plead the plea to the full extent, she cannot plead it at all. It is said that the plea is distributive, and therefore the plaintiff should shew to what portion of the time the estoppel is applied. The title and possession, however, are both traversable; and they are presumed to continue until the contrary is shewn: and, as the replication shews a title in the plaintiff by matter of record from the 26th of October, 1853, until entry, his title must be presumed to be still continuing, the contrary not being shewn. If, indeed, there be circumstances to prevent the judgment from operating as an estoppel since that period,—such, for instance, as a subsequent demise to the defendant,—those circumstances might be replied: but the defendant cannot be allowed to admit the judgment, which is conclusive between the parties, and deny the continuance of the plaintiff's title. It is further suggested that the plea of not possessed being, since the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 75, capable of being taken distributively, must be so taken. That section enacts that “pleas of payment and set-off, and all other pleadings, capable of being construed distributively, shall be taken distributively, and, if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the

jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered." The intention of the framers of that act, I think, was, to meet such cases as *Cousins v. Paddon*, 2 C. M. & R. 547, and *Tuck v. Tuck*, 5 M. & W. 109, where a difficulty arose as to entering the verdict where there were pleas of payment or set-off not pleaded to specific sums. The 75th section did not intend to alter the rule of pleading which makes a plea that is bad in part bad altogether; but the meaning of it is, that, when you go down to trial, if the facts can be taken distributively, they are to be so taken: the record is still to be taken as a whole record. And in this there is no injustice. The plaintiff complains of a trespass; the defendant says, "You were not possessed of the premises upon which the alleged trespass was committed; for, somebody else had title:" to which the plaintiff answers,—“You are not at liberty to deny my title, or to set up the title of a third person, because there has been a judgment in a proceeding between us which has determined the title to be in me, and under which I have entered.” If any circumstances have occurred since that recovery to alter the position of things, the defendant should have shewn that by way of rejoinder. The same observations afford an answer to the fourth plea, which sets up a demise from George Wilkinson to Hester Thomas for twenty-one years from the 29th of September, 1846, and a subsequent demise from Thomas to the defendant for one year from the 25th of March, 1847, —with this additional remark, that it sets up a term that could not have been created consistently with the judgment in ejectment which is admitted by the plea. I think, therefore, the defendant was estopped from set-

1854.

 WILKINSON
 v.
 KIRBY.

1854.

WILKINSON

v.

KIRBY.

ting up either defence, and that the plaintiff is consequently entitled to judgment.

MAULE, J. I am of the same opinion. The replication does not shew the title of the plaintiff; it only shews matter to estop the defendant from setting up the defence attempted. This is the proper province of a replication by way of estoppel. If it shews something else also, it is not the less a good replication by way of estoppel, provided that other matter is not inconsistent with the matter of estoppel. The replication seems to me to come to this:—The defendant by her (third) plea says the plaintiff is not possessed, that is, that he has no such right of possession or property as to entitle him to maintain trespass for the mesne profits. The plaintiff by his replication says,—“That may or may not be true; but you have no right to say so, for, there has been a decision between us before a competent tribunal, in which a judgment has been pronounced affirming my title as against you.” That is an estoppel of the highest degree: and it amounts to an allegation, that, in a proceeding in ejectment between the plaintiff and the defendant, it was decided by a competent tribunal, that, from and after the 26th of October, 1853, the plaintiff was so entitled to the possession as to be able to maintain this action of trespass for the mesne profits. That is inconsistent with the defendant’s plea of not possessed. The plaintiff and defendant are both named in the writ; the defendant being alleged to be the tenant in possession. She is, therefore, bound by the estoppel. The difference which formerly existed between actions of ejectment and other actions, exists no longer: the Common Law Procedure Act puts all upon the same footing; and the fact of the plaintiff’s title having been determined in an action of ejectment, the result is the same as if it had been determined in any other form of

action. It is said that the plea is distributive, and that it is as if there were several pleas applying to various portions of time, one before and another after the time of the suing out of the writ, and that the replication should have been confined to the former period of time only. The plea, however, is pleaded to the whole time; and, if the defendant is estopped from pleading it as to any portion of the time, she is estopped from pleading it altogether. Now, it cannot be denied that she is estopped as to some portion of the time covered by the plea, and therefore she is precluded from pleading it, and the replication is good. If the replication had addressed itself to trespasses committed before the 26th of October, 1853, I admit that it might have been defective: but it is not so pleaded. The answer to the defendant's objection is, that, when once it is alleged that there was a recovery in ejectment, the title is conclusively shewn to be in the plaintiff from the day of the demise. He is not bound to aver that that state of things continued. That is to be presumed. If it did not continue, it was for the defendant to shew that by her rejoinder. At all events, it could only be matter of special demurrer, and special demurrers are now at an end. I therefore think the replication is a sufficient answer to both the pleas, to both of which these remarks apply, and more especially to the fourth, which is also open to further objection.

1854.

WILKINSON
v.
KIRBY.

CRESSWELL, J. I am of the same opinion. It cannot be contended now, that the recovery in ejectment is not a good replication by way of estoppel to a plea of not possessed in trespass for mesne profits. *Doe v. Wright* was much considered; and I see no reason to find fault with the decision, although the court of Exchequer in a subsequent case of *Doe v. Wellsman* took exception to one particular passage of Lord Denman's judgment. In

1854.
WILKINSON
v.
KIRBY.

Doe v. Wellsman, the declaration stated the entry and expulsion on the 10th of December, 1844, and the expulsion and taking of profits to have continued till the 10th of March, 1846. The defendant pleaded that the closes in which &c. were not, nor were any of them, or any part thereof, the plaintiff's, *modo et formâ*. The plaintiff replied *to the whole plea*, by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment stating the demise to have been on *the 14th of October, 1845*, for a term of twenty years, and concluding with a prayer of judgment if the defendant during that term ought to be admitted, against the said recovery, record, and proceeding, to plead that plea: and the court held, on special demurrer, that the replication, though professing to apply to the whole plea, applied only to part of the time of the trespass complained of in the declaration, and was therefore bad. I think there may be strong reasons for saying that such a plea as this might be entered distributively. But the better answer to the defendant's objection seems to me, to be that there is nothing to shew that the replication does not cover the whole period.

CROWDER, J. I also am of opinion that the plaintiff is entitled to the judgment of the court on the demurrer to this replication. Upon the point mainly relied on by the defendant, viz. that this is a replication of a judgment recovered in ejectment by default, which is not the subject of an estoppel, whatever might have been the case before the Common Law Procedure Act, I agree with my Brother Maule in thinking that the 168th and 170th sections of that statute place the parties, with respect to judgment by default in ejectment, in precisely the same position as the parties in any other forms of action. The question is, whether it is a good replication to either of these pleas. It is said that the plea of not

possessed may be taken distributively, and that it does not appear that the estoppel applies to any time subsequent to the entry of the plaintiff: and *Doe v. Wright* is referred to. But the answer is, that the presumption of law is, that the title is continuing until the contrary is shewn. And this imposes no hardship on the defendant: for, if there were any change of circumstances, she might have shewn it by her rejoinder.

Judgment for the plaintiff.

1854.

WILKINSON
v.
KIRBY.

In the Matter of the Acknowledgment of
MARY BINGLE.

Nov. 23.

OGLE moved that the registrar of certificates of acknowledgments of married women, under the 3 & 4 W. 4, c. 74, might be at liberty to receive and file the certificate and affidavit in this matter, notwithstanding certain defects therein. In the first place, the commission was addressed to John Bingle the younger, and he signed it "John R. Bingle." There was, however, an affidavit identifying the signature and the person of John Rayden Bingle as being those of the party described in the certificate as John Bingle the younger.

The court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn.

MAULE, J. That will do.

Ogle. The other defect is this:—In that part of the affidavit verifying the certificate of acknowledgment, which states the inquiries made of the married woman previous to her making the acknowledgment, the word "not" had been by accident inserted, thus,—“and that, in answer to such inquiry, the said Mary Bingle declared that she did *not* intend to give up her interest,” &c. There was an affidavit by the attorney who prepared the

1854.
 In re
 MARY BINGLE.

document, and of his managing-clerk, and the law-stationer who ingrossed it, stating that the word "not" did not appear in the draft (which was exhibited to the court), and that the word was struck through with a pen before the document was sent out to New South Wales: but the magistrate before whom it was sworn had omitted to place his initials in the margin. The affidavit of the attorney also stated that "the deponent verily believed, and had no reason whatever to doubt, that the acknowledgment referred to in the affidavit of verification was freely and voluntarily made by the said Mary Bingle, and that she *did* intend to give up her interest in the said hereditaments giving occasion for the said acknowledgment (which interest was merely contingent on her surviving her husband), without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up her interest in the said estate." [Maule, J. I doubt whether it would answer your purpose to have this affidavit filed. The alteration is in a material part. The *presumption* is that the erasure was made after the deed was executed.] The affidavit would cure that. [Jervis, C. J. The affidavit will be filed *here*; the certificate at another place.] In *Doe d. Tatum v. Catmore*, 16 Q. B. 745, it was held, that, as a deed cannot be altered after execution, without fraud or wrong, the presumption, if an alteration appears, is, that it was made before execution. Lord Campbell there says: "In Co. Litt. 225. b., it is said, that, 'of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged, upon their view, the deed to be void. But, of latter time, the judges have left that to the jurors to try whether the rasing or interlining were before the delivery.' In a note (136) upon this passage in Hargrave and Butler's edition of Coke upon Littleton, it is laid down, 'Tis to be presumed that an interlining, if the contrary

is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered after it is executed, without fraud or wrong; and the presumption is against fraud or wrong. A testator may alter his will without fraud or wrong after it has been executed; and there is no ground for any presumption that the alteration was before the will was executed." Here we have the strongest possible evidence to rebut the presumption, if any presumption *could* be made against the validity of this deed. [*Cresswell*, J. The certificate is in the proper form. If that is filed, the transaction cannot be impeached.]

1854.

In re
MARY BINGLE.

Cur. adv. vult.

JERVIS, C. J., on a subsequent day, said that the Court had looked at the documents, and at the affidavits, and also at the original draft, and were of opinion that the order might go.

Fiat.

In the Matter of the Arbitration between JOHN MILNES
and ROBERT HENDERSON ROBERTSON.

Nov. 23.

BY an award, dated the 20th of May, 1854,—reciting, that, by an agreement made between John Milnes of the one part, and Robert Henderson Robertson of the other part, it was, amongst other things, agreed that certain differences which had arisen between the said parties with respect to the terms upon which a certain promissory note, in the said agreement described as a promissory note for 350*l.*, drawn by Harrison and others in favour of Wall, was delivered in July, 1852, to the said John Milnes, and as to the right, title, and interest of the said parties respectively, *or of the assignees of the said John Milnes*, to recover 250*l.*, part thereof, should

It is competent to a bankrupt, if he will, to become party to a reference concerning a matter which has passed to his assignees; and, if the bankrupt be ordered by the arbitrator to pay costs, the court will enforce the payment by rule under the 1 & 2 Vict. c. 110, s. 18.

1854.

In re
MILNES
and
ROBERTSON.

be referred to the award, order, arbitrament, &c., of H. H.,—the arbitrator awarded of and concerning the matters so referred to him by the said agreement, as follows,—“ I do find and award that the said promissory note above and in the said agreement mentioned and referred to, was delivered in July, 1852, by the said Robert Henderson Robertson to, and received by, the said John Milnes upon the terms following, that is to say, that the said John Milnes should therewith, or out of the proceeds thereof, pay, satisfy, and discharge to one R. M'Glew the amount of, and all interest due upon, a certain bill of exchange drawn by the said R. H. Robertson upon one Janet Robertson, for 220*l.*, and which said bill had been indorsed by the said R. H. Robertson to the said John Milnes, and by the said John Milnes to the said R. M'Glew, and should also procure the said R. M'Glew to stay all further proceedings in a certain action which the said R. M'Glew had then commenced, and which was then pending against the said R. H. Robertson for the recovery of the amount of the said last-mentioned bill; and that the said John Milnes should also deliver to the said R. H. Robertson a certain bill of exchange drawn by the said John Milnes upon and accepted by one W. Buckley for 100*l.*: And I further find and award that the said John Milnes did, in pursuance of the said terms, deliver to the said R. H. Robertson the said last-mentioned bill of exchange so drawn by the said John Milnes upon the said W. Buckley as aforesaid: And I further find and award, that there never was, except as aforesaid, any value or consideration for the delivery by the said R. H. Robertson to the said John Milnes of the said promissory note, and that the said promissory note was delivered by the said R. H. Robertson to, and received by, and was always held by the said John Milnes, upon the terms aforesaid, and upon no other terms whatsoever: And I do further find and

award, that the said John Milnes did not at any time, with the said promissory note, or out of the proceeds thereof, or in any other manner, pay, satisfy, or discharge to the said Robert M'Glew the amount of the said bill of exchange so drawn by the said R. H. Robertson upon the said Janet Robertson as aforesaid, or the interest due thereupon, or any part thereof, nor did the said John Milnes procure the said R. M'Glew to stay all further proceedings in the said action, or to stay the said action, or any proceedings therein at all: And I further find and award that the said R. H. Robertson was afterwards compelled to pay, and did pay, to the said R. M'Glew the amount of the said last-mentioned bill of exchange, and the interest due thereon, and also the costs of the said action, in order to procure the said R. M'Glew to stay the same: I do further find and award, that the said R. H. Robertson did at some time after the said bill of exchange so drawn by the said John Milnes upon the said W. Buckley had been delivered to him as aforesaid, receive from the said W. Buckley the amount thereof, viz. the sum of 100*l.*, and that afterwards, and before the making of the said agreement of reference, such last-mentioned amount of 100*l.* was paid over by the said R. H. Robertson to, and was received by, the said John Milnes, as and for the proceeds and amount of the said last-mentioned bill, and in satisfaction and discharge of all claim which the said John Milnes ever had upon the said promissory note by reason of the delivery by the said John Milnes to the said R. H. Robertson of the said bill so accepted by the said W. Buckley as aforesaid: And I further find and award that the said last-mentioned sum of 100*l.* was afterwards paid over by the said John Milnes to his assignees mentioned or referred to in the said agreement of reference: And I do further find, award, and adjudge, that, at the time of the making of the said agreement of reference above recited, and from thence hitherto,

1854.

In re
MILNES
and
ROBERTSON.

1854.

In re
MILNES
and
ROBERTSON.

neither the said John Milnes, nor his said assignees in the said agreement of reference mentioned or referred to, nor any or either of them, had any right, title, or interest in or to the said promissory note, or the amount thereof, or any part thereof, or to recover any part of the amount thereof, but that the said R. H. Robertson had at the time of the making of the said agreement of reference, and from thence hitherto, the sole right and title to and interest in the said promissory note, and the amount thereof, and every part thereof, and the sole right to recover the amount thereof, and every part thereof: And I do further award and adjudge that the said John Milnes shall and do pay to the said R. H. Robertson all the said R. H. Robertson's costs of the said reference, and that the said John Milnes shall and do bear and pay his own costs of the said reference, and also all other costs of the said reference, and the costs of this my award."

The agreement of reference having been made a rule of court, Robertson's costs were taxed and allowed at the sum of 56*l.* 10*s.* 2*d.*, which sum was duly demanded of Milnes, and, on his refusal to pay, a summons was taken out under the 1 & 2 Vict. c. 110, s. 18, calling upon Milnes to shew cause why he should not forthwith pay that sum. The summons came on to be heard before Cresswell, J., who referred the matter to the court.

Aspland, accordingly, on a former day in this term, obtained a rule nisi. It appeared by the affidavits upon which he moved, that the agreement of reference, after reciting that differences had arisen between Milnes and Robertson with respect to the terms upon which a certain promissory note for 350*l.*, drawn by Harrison and others in favour of Wall, was delivered in July last to Milnes, and as to the right, title, and interest of the

said parties respectively, or of the assignees of Milnes, to recover the sum of 250*l.*, part thereof,—provided, amongst other things, that *the said John Milnes or his assignees* should have the right to proceed in the matter of the said reference, and that Robertson should be precluded from raising any objection to the validity of the agreement, or the award to be made thereon, on the ground that the agreement was entered into by him with the said John Milnes (the latter being a bankrupt), and not with his assignees; and that, in case the award should be in favour of Milnes or his assignees, the latter should be at liberty to enforce the award in the same manner as if they were parties to the agreement.

1854.

In re
MILNES
and
ROBERTSON.

Stammers now shewed cause, upon an affidavit, amongst others, of Milnes, wherein it was stated, amongst other things, that he was declared bankrupt on the 19th of November, 1852; that assignees were duly appointed; that the agreement of reference was entered into by him, at the instance of the solicitor to the assignees, and, at the time he entered into it, the deponent understood that he did so, not on his own account, or for his own benefit, but as the agent for and on behalf of his estate, and upon a distinct assurance that it would not affect him personally; that the deponent was examined as a witness before the arbitrator; and that, before he was so examined, it was agreed between the respective solicitors for the assignees and for Robertson, that the deponent's interest in the subject-matter of the reference had ceased, and had become vested in his assignees, and that the reference should be prosecuted by the assignees in the place or stead of the deponent.

A bankrupt has no power to submit to arbitration a matter his interest in which has passed to his assignees. [*Williams, J.* Can you resist an attachment, on the ground of objections that are not apparent on the face

1854.

In re
MILNES
and
ROBERTSON.

of the award?] The award recites the submission; and that is a void submission, because it was not competent to the bankrupt to enter into it. In *Bac. Abr. Arbitrament and Award* (C), it is laid down that "persons that cannot contract, cannot submit to arbitration; therefore, *femes covert*, &c., cannot submit." Again,— "If an infant submit to arbitration, he may execute or avoid it at his election, as he may all other his contracts. Persons attainted or outlawed cannot submit to arbitration, for they have no property, and cannot by the law controvert any thing." The principle is still further elucidated in *Com. Dig. Arbitrament* (D. 2.), where it is said, that "An infant cannot submit to arbitrament; for, his submission is void. 1 Roll. 268, l. 5." "So, a *feme covert* cannot submit herself to an award." A bankrupt, it is submitted, is under a similar disability. [*Maule, J.* An infant may not be bound by a submission, by reason of intellectual incapacity. So, a *feme covert* is incapable, because she would be affecting to deal with the rights of her husband. But the case of a bankrupt is different: he may make any contract he pleases with respect to futurity. *Jervis, C. J.* Here, the bankrupt undertakes that his assignees shall not object to his incapacity to contract.] So as to bind *them*. The doctrine of mutuality is applicable to the subject of awards. How can there be any mutuality in a case of this sort? If the award were in his favour, the bankrupt could derive no benefit from it. *Marsh v. Wood*, 9 B. & C. 659, 4 M. & R. 504, approaches very nearly to this case. That was an action of covenant by the assignees of A., a bankrupt, on articles of agreement entered into by A. before his bankruptcy, and the defendants, whereby, after reciting that differences existed between the plaintiffs and the defendants respecting certain ships of war purchased by the former, they bound themselves to abide by the award of W. S.; and the breach

assigned, was, that the defendants had revoked their submission. The defendant pleaded, that, before any award was made, A. became bankrupt, and all his interest in the subject-matter of the reference was assigned to the provisional assignee. The plaintiffs replied, that the provisional assignee assigned to them: and, upon demurrer, it was held, that, as the subject-matter of the reference was taken out of the bankrupt, and assigned to the plaintiffs, who would not have been bound by the award, the submission was no longer mutual, and therefore was not binding. Lord Tenterden said: "It does not appear necessary to decide that bankruptcy in general revokes a submission to arbitration: for, in this case, it appears on the record that all the bankrupt's interest in the matters in dispute had passed to the assignees, and they clearly would not have been bound by the award of the arbitrator. The defendants, therefore, ought not to be bound. It is clear, upon the authorities quoted at the bar, that, if the original submission does not bind all the parties, it does not bind any of them. If, then, a submission not originally binding all is void, we must say, as a rational consequence, that, if by matter ex post facto a submission becomes ineffectual as to one party, it must be altogether void." (a) If the validity of the award be only *doubtful*, the court will not enforce it, either by attachment, or by rule under the statute: *Dickenson v. Allsop*, 13 M. & W. 722.

1854.

In re
MILNES
and
ROBERTSON.

Aspland was not required to support his rule.

JERVIS, C. J. I think this rule must be made absolute, the award, notwithstanding the objection which has been urged against it, being perfectly valid. A man,

(a) See *Taylor v. Shuttleworth*, 6 N. C. 277, 8 Scott, 565; *Hemsworth v. Brian*, antè, Vol. I, p. 131.

1854.

In re
MILNES
and
ROBERTSON.

being a bankrupt, with his eyes open, chooses to enter into an agreement of reference touching a claim belonging to his estate. He knows that he has no interest in the matter, and he must be presumed to know the consequences of what he is doing. The result is adverse to him, and he is called upon to pay costs. This is not at all like the case of *Marsh v. Wood*, where the submission was entered into before the bankruptcy: neither does it fall within the principles which govern the cases adverted to, of infants, femmes covert, and persons attainted. I think Milnes cannot be heard to impeach the award. The rule must be made absolute, with costs.

MAULE, J. I also think this rule must be made absolute. It is perfectly competent to a bankrupt to become party to a reference. It is a fallacy to say that he is incapacitated by reason of want of interest. Subject to the claims of his creditors, he has an interest in his estate. Many cases may be supposed where the legal interest might remain in the bankrupt, as in the case of a chose in action assigned by him before his bankruptcy: *Winch v. Keeley*, 1 T. R. 699. Besides, if a bankrupt chooses to assume that he has some right or interest, it is perfectly competent to him to make that the subject of a submission to arbitration if he will. This is not like the case of *Marsh v. Wood*, where, the bankruptcy having taken place after the submission, the other party was held entitled to revoke it, for want of mutuality. Here, the parties deal quite openly; each knows the position of the other; and each must be assumed to be cognisant of the responsibility he was imposing upon himself.

WILLIAMS, J. I am entirely of the same opinion. *Marsh v. Wood* belongs to that class of cases which have held that the submission to an arbitration is void if the

failure arises from circumstances happening after the submission is entered into. This is not a case of that sort. The bankrupt, after his effects had become vested in his assignees, chose to make himself party to a reference in which he may have no interest. He must abide by the consequences of his act.

1854.

In re
MILNES
and
ROBERTSON.

CROWDER, J. I am of the same opinion. The bankrupt was not compelled to enter into the agreement to refer. But, having chosen to do so, he is clearly bound by it.

Rule discharged, with costs.

HITCHINS v. THE KILKENNY AND GREAT SOUTHERN
AND WESTERN RAILWAY COMPANY.

Nov. 24.

WILLES, on a former day in this term, obtained a rule calling on Richard Henry Witty, a shareholder in the above company, to shew cause why a writ of scire facias upon the judgment obtained by the plaintiff in this cause should not be issued against him, as such shareholder of the said company, to enable the plaintiff to have execution upon the said judgment to satisfy the plaintiff for the residue unpaid on such judgment, amounting, with interest thereon, to 1158*l.* 1*s.* 3*d.*, to the extent of the said R. H. Witty's shares in the capital of the said company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845.

The affidavits upon which the rule was obtained, stated, that the plaintiff commenced an action in this court in May, 1849, against the defendants, a company incorporated by act of parliament, 9 & 10 Vict. c. cclx, in which act the Companies Clauses Consolidation Act, 1845, is incorporated; that judgment was recovered in

To entitle a judgment-creditor of a railway company to a scire facias against a shareholder, under the 8 & 9 Vict. c. 16, s. 36 (the Companies Clauses Consolidation Act, 1845), it is not enough to shew that a fl. fa. has been issued against the company, and returned nulla bona: the affidavit must go on to allege circumstances to satisfy the court that due diligence has been used by the plaintiff to discover property of the company out of which he might obtain satisfaction of the judgment.

1854.
HITCHINS
v.
THE
KILKENNY
AND GREAT
SOUTHERN AND
WESTERN
RAILWAY CO.

the said action against the company for 1362*l.* 16*s.* 2*d.* debt, and 27*l.* 2*s.* damages; that two several writs of fi. fa. for the amounts so recovered were in February, 1850, issued on behalf of the plaintiff, into the counties of Surrey and Middlesex, the said county of Surrey being the county in which the venue was laid, and the county of Middlesex being the county in which the said company then or lately had offices; that the said writs were returned nulla bona; that there was due and unsatisfied upon the said judgment the sum of 289*l.* 18*s.* 6*d.*, with interest; that the deponent applied at the office of the company, situate at No. 17, Gracechurch Street, in the city of London, and requested to see the secretary of the said company; that he there saw Mr. W. S. Parker, who stated that he was the secretary of the above-named company; that Parker produced to the deponent the sealed share-registers of shareholders of the company for the years 1848 and 1854; that the deponent searched the said registers, and upon each of them found the name of Richard Henry Witty as the holder of thirty shares in the said company, upon which 45*l.* had been paid; that the said shares are of the value of 20*l.* each, as the deponent had been informed and believed; that the deponent then inquired of Parker if Witty had made any application to him, as secretary of the said company, to transfer his shares, or any of them, and was informed by him that he had not; that the deponent was further informed by Parker that there were three calls of 10*s.* each due from Witty upon each of the said shares on the 29th of May last; that he was informed by Parker that the company had not then, and to the best of his information and belief never had, purchased or held any land, or had any goods or chattels whatever in Ireland, whereon the plaintiff could levy the amount of the judgment debt in the action, or any part thereof; that Parker also informed the deponent that he was secretary to

The Waterford and Kilkenny Railway Company, and that the furniture and effects in the said office at Gracechurch Street were the property and effects of the last-named company, and that the said Kilkenny and Great Southern and Western Railway Company had not, to the knowledge of Parker, any lands, goods, or effects in England whereon the plaintiff could levy the amount of the judgment, or any part thereof; that the deponent verily believed the information so given to him by Parker to be true; and that Witty had received due notice of the application.

1854.

HITCHINS
v.
THE
KILKENNY
AND GREAT
SOUTHERN AND
WESTERN
RAILWAY CO.

Lush now shewed cause. This application is founded upon the 36th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 16, which enacts, that, "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, *and if there cannot be found sufficient whereon to levy such execution*, then such execution may be issued against any of the shareholders, to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; and, for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times to inspect the register of shareholders, without a fee." The question is, whether the affidavits upon which this rule were moved contain enough to shew the court that "there cannot be found sufficient

1854.
 HITCHINS
 v.
 THE
 KILKENNY
 AND GREAT
 SOUTHERN AND
 WESTERN
 RAILWAY CO.

effects of the company whereon to levy the execution." On a former application by this plaintiff against one Emery, another shareholder of this company (a), the court refused to grant a scire facias upon an affidavit merely stating that judgment had been obtained against the company, and that two writs of fieri facias issued against them, and had been returned nulla bona. The affidavits upon the present occasion carry the matter very little further: they amount in substance to a statement, that, from information received from Parker, the secretary, the company have not, to the knowledge of that gentleman, any property or effects in England. It does not appear that any inquiry has been made elsewhere. And, as to the two writs, they may have been returned nulla bona at the instance of the plaintiff himself. [*Jervis*, C. J. Very little diligence, certainly, seems to have been used. *Maule*, J. It is the business of a plaintiff who wants a scire facias to shew that he has no means of obtaining satisfaction of his judgment without it. This seems to be an attempt to cast the burthen of proof upon the shareholder. The party ought to satisfy the court that he wants the writ, and that he cannot do without it. Do these affidavits shew more than that the plaintiff *wants the writ*?] The affidavits do not even allege that the money is due *to the plaintiff*. It is quite consistent with everything that is sworn, that the judgment may have been assigned to a third person,—to the company themselves, for whose benefit this application may be made.

Willes, in support of his rule. The court is not now called upon to decide whether or not the facts exist which entitle the plaintiff to enforce his judgment against

(a) *Hitchins v. The Kilkenny and Great Southern and Western Railway Company, in re Emery*, antd, Vol. X, p. 160.

Mr. Witty. There is no hardship in making the shareholder pay what he owes to the company. The fact of his liability, and its extent, will be ascertained when the scire facias is granted. [*Maule*, J. Must the scire facias allege that due diligence has been used?] In *Marson v. Lund*, 16 Q. B. 344, it did so allege, and there was a traverse of the allegation. Lord Campbell there says: "If due diligence has not been used to obtain satisfaction from the effects of the company, that may be pleaded, and will be a good answer to the sci. fa. And, if there is any other legal reason why the sci. fa. should not issue, that also must be a matter of plea." [*Jervis*, C. J. The statute does not require the scire facias to aver diligence.] It does not: that is a condition required by the court, to satisfy itself that there is a case for inquiry. What more is the plaintiff to do to entitle himself to have the question tried on a scire facias, than has been done here? Is he to negative by anticipation every possible form of defence that could be suggested? Inquiry has been made at the only proper place for obtaining information, viz. the office of the company, and of their secretary. The company was established, for the purpose of making a railway in Ireland, so long ago as 1846; and they appear never to have acquired a foot of land there: nor do they, to the knowledge of their secretary, possess any property or effects whatsoever in this country. As to the suggestion that the judgment in this action may have been assigned by the plaintiff to the company themselves,—it is not alleged in any affidavit that that has been done: and the court will never presume fraud. [*Maule*, J. Would it be any answer, if it *had* appeared by affidavit that the judgment debt had been assigned to the directors?] Clearly not. And, if the law prevents such a transaction, the fact might be pleaded to the scire facias.

1854.

HITCHINS
v.
THE
KILKENNY
AND GREAT
SOUTHERN AND
WESTERN
RAILWAY Co.

1854.
 HITCHINS
 v.
 THE
 KILKENNY
 AND GREAT
 SOUTHERN AND
 WESTERN
 RAILWAY CO:

JERVIS, C. J. My learned Brothers seem to think enough is shewn upon the affidavits to entitle the plaintiff to a scire facias; and I do not very much object.

Rule absolute.

WOOD v. THE GOVERNOR AND COMPANY OF COPPER
 MINERS IN ENGLAND.

Nov. 3.

A cause and all matters in difference between the plaintiff and the defendants were by an order of nisi prius and a subsequent rule of court, referred to an arbitrator, the costs of the cause to abide the event, and those of the reference and award to be in the discretion of the arbitrator, who was to be at liberty to make two several awards at different times, by the first of which he was to raise questions of law for

THIS was an action of covenant upon articles of agreement entered into on the 21st of July, 1847, between the plaintiff and the Governor and Company of Copper Miners in England.

By an order of nisi prius made at the Gloucester Spring Assizes, 1848, it was ordered that a verdict be taken for the plaintiff for the damages in the declaration, subject to a reference to Mr. Bros, to whom the cause and all matters in difference between the parties were referred, and who was to raise upon his award such questions for the opinion of the court as either of the parties might call upon him to do, and to assess the damages contingently upon certain issues of law,—*the costs of the cause to abide the event*, and the costs of the reference and award to be in the discretion of the arbitrator.

the opinion of the court; and it was by the rule of court ordered "that neither party should enforce payment of anything which might be found due by the arbitrator, under the first award, until the arbitrator should have made his final award."

The arbitrator stated a case for the opinion of the court; and, in the result, the plaintiff became entitled to 2272*l.* 2*s.* damages. The defendants afterwards obtained an act of parliament for regulating their affairs, and under that act the plaintiff received an allotment of shares in lieu of the damages so awarded to him. It having become unnecessary and impracticable to proceed further with the reference, no second award was ever made. The plaintiff, however, signed judgment, and issued an execution against the defendants thereon, *for the costs of the action* :—

The court set aside the judgment, with costs,—holding, that, in the absence of a *final* award, the plaintiff was by the rule of court precluded from enforcing his remedy for such costs.

By a rule of court, of the 11th of May, 1848, it was ordered "that the arbitrator should be at liberty to make and publish two several awards, at different times, of and concerning the different matters referred to him, and in and by the first of his said awards to raise such points of law for the opinion of the court as either of the parties should require him to do, and to assess the damages contingently upon the demurrer depending in the cause, and upon the views which the court might take of the questions of law so to be submitted to them as aforesaid; and that, after the judgment of the court should have been given upon the demurrer, and also upon the questions of law to be submitted to the court as aforesaid, the arbitrator should be at liberty to make and publish his second award of and concerning the other matters so as aforesaid referred to him; and that neither party should enforce payment of anything which might be found due by the arbitrator, under the first award, until the arbitrator should have made his final award between the parties."

On the 6th of November, 1848, Mr. Bros made his first award (as it was called), raising certain questions for the opinion of the court, in the shape of a special case. The case and the demurrer were argued together; and, on the 30th of May, 1849, the court gave judgment for the plaintiff on the demurrer: *vide antè*, Vol. VII, p. 906. The result was that the plaintiff was held entitled to recover a sum of 2272*l.* 2*s.*

On the 24th of July, 1851, an act passed intituled "An act for facilitating the settlement of the affairs of the Governor and Company of Copper Miners in England, and for the better management of the said Company," 14 & 15 Vict. c. cv.

On the 10th of December, 1851, at a meeting of debenture holders and creditors of the company duly convened pursuant to the 8th section of that act, it was

1854.

WOOD

vs.
THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

1854.

WOOD
v.
THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

resolved by four fifths in value of the holders of debentures, promissory notes, and loan notes, and other creditors of the company present at the meeting, as follows:—"That it is expedient to convert all the debentures, promissory notes, loan notes, and debts of the Governor and Company of Copper Miners in England, the holders and creditors in respect of which, at the time of the first insertion of the advertisement of this meeting have not executed the indenture of the 3rd of November, 1848, mentioned or referred to in 'The Governor and Company of Copper Miners Act, 1851,' or left claims in the master's office under the decree in the said act also mentioned, for the purpose of claiming the benefit of the said indenture, or who, having left such claims, had abandoned the same, and all claim to the benefit of the same indenture, and under the said decree, or who had been declared in the suit in the said act mentioned not to be entitled to the benefit of the same indenture, by reason of their not having executed the same indenture within twelve calendar months after the date thereof,—into paid up stock of the said company at the rate of 50*l.* per centum of the amount of such debentures, promissory notes, loan notes, and debts."

By the 12th section of the act,—after reciting that "a certain action of covenant is depending in Her Majesty's court of Common Pleas at Westminster, wherein H. W. Wood is plaintiff, and the said Governor and Company of Copper Miners in England are defendants, and the said action and all matters in difference between the said H. W. Wood and the said Governor and Company of Copper Miners in England stand referred to T Bros, Esq., with power to publish two separate awards at different times, and by the first of these awards to raise points for the opinion of the court, and on the judgment of the court thereon to make his second award; and that, on the 6th of November, 1848, the said

T. Bros made his first award, and thereby assessed certain damages sustained by the said H. W. Wood at the sum of 2272*l.* 2*s.*, and the verdict was issued [sic] for the plaintiff on the first four issues, and certain questions of law were raised for the opinion of the court on the fifth issue, *and the second and final award of the said arbitrator hath not been made*,"—it is enacted "that the said H. W. Wood shall be deemed and considered a creditor of the said Governor and Company of Copper Miners in England, within the intent and meaning of this act, for all and every such sum and sums of money as *have been and shall be* awarded to the said H. W. Wood by the said T. Bros, or by any other arbitrator to whom the said cause and matters may hereafter at any time be referred in the place of the said T. Bros, and *for any costs* which shall be awarded by the said T. Bros, or other such arbitrator as aforesaid, to be paid by the said Governor and Company of Copper Miners in England to the said H. W. Wood; and that, until the said T. Bros, or such other arbitrator as aforesaid, shall have made his final award, the said H. W. Wood shall be deemed and considered a creditor of the said company for the said sum of 2272*l.* 2*s.*"

After the passing of the resolution of the 10th of December, 1851, the sum of 1136*l.* in paid up stock of the company was duly allotted to the plaintiff, in pursuance of that resolution; and the plaintiff accepted such stock so allotted to him.

The plaintiff, after having received the allotment above mentioned, proceeded to tax his costs of the action, to the amount of 324*l.* 13*s.* 6*d.*, and final judgment was signed on the 3rd of April, 1854, for the 2272*l.* 2*s.*, and the said costs; and on the 8th of June the plaintiff issued a fi. fa. thereon for the costs.

Upon an affidavit of the above facts, and also stating, that, after the passing of the above act, and before the

1854.

WOOD

vs.
THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

1854.

WOOD
v.
THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

judgment had been signed in the action, the lands, mines, collieries, hereditaments, plant, machinery, fixtures, and effects comprised in the mortgage security in the said act (s. 22) mentioned, were, in pursuance of an arrangement made between the defendants and the Bank of England, reconveyed to the defendants by the Bank of England; that the deponent was informed by the plaintiff's attorney that he intended forthwith to levy execution upon the property of the company for the costs, unless prevented; that the arbitrator had not made his second award concerning the matters so referred to him as aforesaid; and that the deponent believed, that, on the hearing before the arbitrator of the said other matters, the defendants would be able to substantiate and prove a claim against the plaintiff in respect of the said other matters, far exceeding the amount of the said costs,

Bovill, in Trinity Term last, obtained a rule calling upon the plaintiff to shew cause why the final judgment signed and the writ of *fi. fa.* issued in this cause by the plaintiff should not be set aside, or why the said writ should not be set aside, and why satisfaction should not be entered on the record as to the damages for which the judgment was signed, or why all further proceedings on the said judgment should not be stayed until after the arbitrator should make his final award.

Willes now shewed cause, upon affidavits stating, that the power of the arbitrator to make a second award was only with reference to the determination of the contract between the plaintiff and the company, in case the arbitrator should think fit to determine it, there being then no other matter in difference between them; that the arbitrator declined to determine the contract, unless with the plaintiff's consent; that, the plaintiff having

refused to consent, the arbitrator declined to make any further award; and that the time for so doing had now expired. The company have under the provisions of their act paid the damages to which the costs in question are accessory. The judgment of the court pronounced in Trinity Term, 1849, entitled the plaintiff to damages to the extent of 2272*l.* 2*s.* What is there to deprive him of his costs? If entitled to damages, he must of necessity be entitled to costs also. [*Jervis*, C. J. Why did he not get his costs at the time of the allotment made to him on account of the damages?] It may be that the legislature thought he should have *all* his costs, and not 50*l.* per cent. [*Jervis*, C. J. One would have expected them to say so, then.] The arbitrator was bound to leave the matter at large; and the result of the judgment of the court rendered it unnecessary for the arbitrator to make any further award. [*Maule*, J. This is not in *form* an award at all. Is it the *substance* of an award, where the arbitrator omits to make an award as to something his awarding on which is to be a condition-precedent to the thing's being an award? The arbitrator here has omitted to dispose of a matter which he had to dispose of as a condition-precedent; and he does not affect to make an award. *Crowder*, J. This has been dealt with as an award for several years, and argued upon as such. (a) *Maule*, J. Its being called so for a century will not make it an award, if it is not an award.] Be the award final or not, there is an award of damages in favour of the plaintiff in the cause, and he is entitled to the costs as a necessary consequence.

Bovill and *R. E. Turner*, in support of the rule. That which is called the first or preliminary award, is in truth

(a) See *Wood v. The Copper Miners Company*, *antè*, Vol. XIV, p. 428.

1854.

WOOD
v.
THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

1854.

WOOD

v.

THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

nothing more than a special case stated for the opinion of the court.

JERVIS, C. J. I think the fair construction of the order and rule of court, is, that nothing was to be done by either party for the purpose of enforcing payment of what might be found due under the first award, until the arbitrator should have made his final award. That being so, the plaintiff could not have enforced payment of the damages until the final award was made, and therefore can have no remedy for the costs. I therefore think the rule must be made absolute to set aside the execution.

MAULE, J. It seems to me that the effect of the whole is this:—A cause and certain matters in difference are referred to a barrister. There being certain grave questions involved in the inquiry, it is agreed, that, before determining the matters in controversy, the arbitrator shall obtain the benefit of the opinion of the court. The arbitrator has done this, and he has done no more. He has not, therefore, made an award in the sense of the order of reference. He did not intend or profess to make an award so as finally to dispose of the matters in difference: and, before the time for doing that arrived, an act of parliament passed under which the plaintiff (in common with other creditors of this company) received debentures or shares in satisfaction of the damages sought to be recovered in the action; and thereby the plaintiff's right to damages was put an end to. Under the second rule (of the 11th of May, 1848), the arbitrator had power to award what sum should be paid to the plaintiff as the price of the determination of the contract. The plaintiff declined to give up the contract: and, as that was the principal object of proceeding further in the arbitration, the arbitrator considered

it unnecessary to make an award. The second rule provides that "neither party shall enforce payment of any thing which may be found due by the arbitrator, under the first award, until the arbitrator shall have made his final award between the parties." It is clear that no final award has been made. That which has been made is not final either in form or in substance. The plaintiff, therefore, being conclusively estopped from enforcing the judgment, the justice of the case clearly is that the judgment should be set aside. It is part of the means of enforcing that which the second rule says he shall not enforce. I therefore think the rule should be made absolute to set aside the judgment.

1854.

WOOD
v.
THE GOVERNOR
AND COMPANY
OF COPPER
MINERS IN
ENGLAND.

CROWDER, J. I entirely concur with my Brother Maule. It seems agreed by the rule of court of the 11th of May, 1848, that there should be two awards. In all cases where matters in difference are submitted to an arbitrator, it is a condition that he shall finally dispose of all the matters referred. Where the arbitrator is to make two awards, the agreement to that effect implies that the first award is not to be final. Here, the arbitrator made his first award, which professes not to be a final award. Nothing is said about costs. The mention of costs probably was omitted, because the arbitrator intended they should be fully and finally disposed of by his second award. The plaintiff by signing judgment is seeking to do that which is directly prohibited by the rule.

Rule absolute to set aside the
judgment, with costs.

1854.

Nov. 24.

The affidavit upon a motion to set aside proceedings to outlawry for irregularity must shew that the party making it is duly authorised as the attorney of the defendant.

SKINNER and Others v. CARTER.

WILLES, on a former day in this term, obtained a rule calling upon the plaintiffs to shew cause why the writs of exigent and allocatur exigent issued in this cause, and the judgment of outlawry entered against the defendant, should not respectively be set aside for irregularity, with costs.

Lush, who appeared to shew cause, objected that the affidavit upon which the rule was obtained, did not appear to be sworn by the defendant, or by his attorney, or a person standing in any relation to him to warrant the application on his behalf; the deponent being merely described as "R. G. E., of &c., gentleman." This was decided in this court in *Houlditch v. Swinfen*, 2 N. C. 712, 3 Scott, 169, 5 Dowl. P. C. 36, upon the authority of an earlier case in the Queen's Bench, of *Phunkett v. Buchanan*, 3 B. & C. 736, 5 D. & R. 625. The present rule, therefore, has been obtained without authority, and must be discharged with costs. [*Maule, J.* It is like error to set aside proceedings, by a stranger.] Precisely so.

Willes admitted that he could not sustain his rule.

Rule discharged, with costs.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

HILARY TERM,

OF THE

EIGHTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES USUALLY PRESENT DURING THIS TERM, WERE,—JERVIS
C. J., CRESSWELL, J., WILLIAMS, J., AND CROWDER, J.

REGULÆ GENERALES.

THE 4th section of "The Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, enacts that "it shall be lawful for the court of Common Pleas at Westminster, or any three of the judges thereof, of whom the Chief Justice shall be one,—and it shall be lawful for the superior courts in Dublin, or any nine of the judges thereof, of whom the Lord Chancellor, the Master of the Rolls, the Lords Chief Justice of the Queen's Bench and Common Pleas, and the Lord Chief Baron of the Exchequer, shall be five,—from time to time to make all such general rules and orders as to the forms of proceedings and process, and all other matters and things touching the practice and otherwise in carrying this act into execution before such courts and judges, as they may think fit, in England or Ireland; and in Scotland it

1855. shall be lawful for the court of Session to make such acts
 REG. GEN. of sederunt for the like purpose as they shall think fit."

In pursuance of the above provision, the judges of
 this court have framed the following rules and forms :—

General Rules as to Forms of Proceedings and Process,
 made pursuant to the statute 17 & 18 Vict.
 c. 31, s. 4, intituled "An Act for the better Regulation
 of the Traffic on Railways and Canals."

1. Every application made under this act to the
 court shall be for a rule calling upon the company or
 companies complained of, to shew cause why a writ of in-
 junction should not issue against such company or compa-
 nies, injoining them to do, or to desist from doing, the
 thing required to be done, or the thing the doing of which
 is complained of by the company or person making such
 application; and every application made under this act
 to a judge at chambers shall be by summons calling upon
 the company or companies complained of to shew cause
 in like manner; which summons shall be granted only
 upon affidavit, and upon a statement made to the judge,
 in like manner as upon an application to the court for a
 rule to shew cause.

2. If on the hearing of any such rule or summons,
 the court or judge shall think fit to direct and prosecute
 inquiries into the matter thereof, under the 3rd section
 of this act, the order for that purpose shall be in the
 following terms, or to the like effect; the rule or sum-
 mons being enlarged until such further day as the court
 or judge shall think fit, in order that in the meantime
 such inquiries may be made and reported on :—

"In the Common Pleas.

"In the matter of the Complaint of A. B. [or, 'of
 the ——— Company'] against the ——— Com-

pany.—It is ordered that C. D., Esq., engineer [*or, as the case may be*], do forthwith make such inquiries into the matter of this complaint as may be necessary to enable the court [*or, 'the Honorable Mr. Justice ——'*] to determine the same, and do report thereon to the court [*or, 'to the said Mr. Justice ——'*], on or before the —— day of —— next.

1855.
REG. GEN.

“Dated this —— day of ——, 185—.”

3. Office copies of all the affidavits filed by either party on the hearing of such rule or summons, shall, at the expense of such party, be furnished to the person appointed to make such inquiries, within three days after the making of such order as aforesaid.

4. The parties shall be entitled to be again heard by the court or judge, upon the said report; but no fresh affidavits shall be allowed on such hearing, unless by leave of the court or a judge.

5. Every writ of injunction issued under this act shall be in the following form, or to the like effect:—

“VICTORIA, &c. To the —— Company, their agents and servants, and every of them, Greeting. Whereas A. B. [*or “the —— Company”*] hath lately complained before us in our court of Common Pleas at Westminster, of a violation and contravention by you the said —— Company of, ‘The Railway and Canal Traffic Act, 1854;’ that is to say, in [*state the act or omission complained of*]: And whereas, upon the hearing of such complaint, the same hath been found to be true: We do, therefore, strictly injoin and command you the said —— Company, and your agents and servants, and every one of you, that you, and every one of you, do from henceforth altogether absolutely desist from [*state the matter for the injunction, where an act done is*

1855. *complained of*] [or "that you and every one of you forth-
 REG. GEN. with do" (*state the matter for the injunction, where an omission is complained of*)] until our said court shall make order to the contrary. Witness, Sir John Jervis, Knight, at Westminster, the ——— day of ———, in the year of our Lord ———."

6. If the court or judge shall think fit also to make an order directing the payment of a sum of money by the company or companies complained of, such order shall be in the following form, or to the like effect:—

"In the Common Pleas.

"In the matter of the complaint of ——— against the ——— Company.—It is ordered that the said ——— Company do pay to the said ——— [or "into court, to abide the ultimate decision of the court in the matter of the said complaint," or "to the use of Her Majesty"] the sum of £—— for every day after the ——— day of ——— instant, that the said company shall fail to obey a certain writ of injunction dated this day, and issued against the said company at the instance of the said ———

"Dated this ——— day of ———, 185 ."

7. If such money be ordered to be paid into court to abide the ultimate decision of the court, the same shall, upon the ultimate decision of the court being made, be paid out of court either to the party complaining, or to the use of Her Majesty, or to the company by which the same was paid into court, as the court or judge shall direct.

JOHN JERVIS.
 W. H. MAULE.
 C. CRESSWELL.
 E. V. WILLIAMS.
 R. B. CROWDER.

January 31, 1855.

1855.

EDWARDS v. HODGES.

Jan. 12.

THIS was an action of trespass for breaking and entering the plaintiff's dwelling-house in the city of London, turning out the plaintiff, and seizing his goods.

The defendant pleaded not guilty "by statute."

The only statute mentioned in the margin of the plea, was, the 11 G. 2, c. 19, ss. 16, 22. The 16th section,—reciting, that, "whereas landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent-arrear, but also refusing to deliver up the possession of the demised premises, *whereby the landlords are put to the expense and delay of recovering in ejectment*,"—enacts, that, "if any tenant holding any lands, tenements, or hereditaments at a rack-rent, or where the rent reserved shall be full three fourths of the yearly value of the demised premises, who shall be in arrear for *one year's rent*, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for *two or more justices of the peace* of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed on the most

Upon a plea of not guilty "by statute," where the defence arises upon several statutes, one or more of which are omitted from the margin, their insertion is an amendment which may be allowed, upon terms, within the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 222, at any time.

The power to view and give possession to the landlord of deserted premises, created by the 11 G. 2, c. 19, s. 16,—extended by the 57 G. 3, c. 52, and varied as to its mode of execution by the 3 & 4 Vict. c. 84, s. 13,—is not, by any of the provisions of the last-mentioned statute, or by the 11 & 12 Vict. c. 43, s. 34, vested in the Lord

Mayor or one Alderman sitting in the justice-rooms at the Mansion-House or Guildhall, so as to enable them to exercise the power in the same manner as a "police magistrate" sitting in one of the metropolitan police-courts may, under the 3 & 4 Vict. c. 84, s. 13, exercise it.

1855.

EDWARDS

v.

HODGES.

notorious part of the premises notice in writing what day (at a distance of fourteen days at least) they will return to take a second view thereof; and, if, upon such second view, the tenant or some person on his or her behalf shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors into the possession of the said demised premises; and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void."

The 22nd section gives the plea of the general issue.

The cause was tried before Jervis, C. J., at the sittings in London after Trinity Term last. It appeared that the plaintiff had been tenant to the defendant of certain premises situate in the city of London, *under a demise thereof which contained no clause of re-entry*; and that *six months' rent* being in arrear, and the premises deserted, and there being no sufficient distress thereon to countervail the arrears of rent, the defendant obtained the assistance of a constable from the justice-room at Guildhall, who, under the authority of a warrant signed by *one of the Aldermen* of the city of London, proceeded to the premises and there affixed a certain notice, and at the expiration of fifteen days delivered the possession thereof to the defendant.

It was thereupon objected, on the part of the plaintiff, that this proceeding was not warranted by the statute mentioned in the margin of the plea: and the Lord Chief Justice allowed the defendant to amend by adding the 3 & 4 Vict. c. 84, s. 13, and the 11 & 12 Vict. c. 43, s. 34,—although it was submitted, on the part of the plaintiff, that this was tantamount to allowing a plea to be added, which, it was said, had never yet been done.

The provisions of the statutes so added, are as follows :—

The 13th section of the 3 & 4 Vict. c. 84, enacts, “that, after the passing of this act, none of the police-magistrates within the metropolitan police-district shall be required to go upon any deserted lands, tenements, or hereditaments, for the purpose of viewing the same or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof under the provisions of the 11 G. 2, c. 19, or 57 G. 3, c. 52; but that, in every case within the metropolitan police-district in which by the said acts, or either of them, two justices are authorised to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police-magistrates, upon the request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said acts, or either of them, are required to be affixed by two justices of the peace; and, upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned, that it has been duly executed, and that neither the tenant nor any person on his or her behalf has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises, it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force requiring him to put the landlord or lessor into the possession of the premises: and every constable to whom any such warrant shall be directed shall duly execute and return the same, subject to the pro-

1855.

EDWARDS
v.
HODGES.
3 & 4 Vict.
c. 84, s. 13.

1855.

EDWARDS

v.

HODGES.

visions contained in the 2 & 3 Vict. c. 47, as to the execution of warrants directed to constables of the metropolitan police force: and, upon the execution of such second warrant, the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void."

11 & 12 Vict.
c. 43, s. 34.

And the 34th section of the 11 & 12 Vict. c. 43 enacts that "it shall be lawful for the Lord Mayor of the city of London, or for any Alderman of the said city for the time being, sitting at the Mansion-House or Guildhall justice-rooms in the said city, to do alone any act at either of the said justice-rooms, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice."

It was then objected, on behalf of the plaintiff, that the statutes so added did not let in the defence; and that it still left the question whether it was not necessary to prove a proviso for re-entry.

The Lord Chief Justice overruled the objection; but he desired the jury to assess the damages which the plaintiff had sustained,—giving the plaintiff leave to move to enter a verdict for the damages so assessed, in case the court should be of opinion that the objection was well founded.

The jury accordingly assessed the damages at 40*l.*, and, in Michaelmas Term last,

Vernon Harcourt moved to enter a verdict for the plaintiff for that sum, or for a new trial on the ground that the amendment was improperly allowed. The first question is, whether, in order to avail himself of the summary remedy afforded by the statutes, the defendant was not bound to prove a demise with a proviso for re-entry for non-payment of the rent reserved. That this was so under the 11 G. 2, c. 19, is clear from two cases.

Thus, in Woodfall's Landlord and Tenant, 2nd edit. (1815) p. 815, it is said: "Lord Kenyon thought,—as the preamble of the clause spoke of the expense and delay to which landlords were put in bringing *ejectments*,—that the clause applied only to cases where the landlord *could* support an ejectment: and therefore, in a case (E. T., 41 G. 3, MS.) where a mandamus to be directed to some magistrates of the county of Middlesex was moved for, in order that they should proceed on s. 16 of the statute to put a landlord into possession of some premises deserted by the tenant, and it appeared that the magistrates had refused to interfere because the tenant was a lodger only,—Lord Kenyon, on referring to the act, asked whether the premises were on lease, and if there was a proviso for re-entering; and, on the counsel answering in the negative, his Lordship said, in his opinion, the case was not within the act, and refused the rule." And this view was adopted by Lord Ellenborough in a subsequent case of *Ex parte Pilton*, 1 B. & Ald. 369, where, upon a motion under s. 17, to restore the possession to the tenant, his Lordship said,—“The 16th clause says nothing about a power of re-entry, and the record has correctly followed the words used in that part of the act. *It is true there must be in fact such a power, according to the case cited, as determined by Lord Kenyon.* But that power does appear by the affidavits to exist in this case.” The statute 3 & 4 Vict. c. 84, s. 13, only affects the mode of procedure. [*Jervis*, C. J. The 57 G. 3, c. 52, passed subsequently to those cases. That statute,—57 G. 3, c. 52,—reciting the 11 G. 2, c. 19, s. 16, enacts, “that, from and after the passing of that act (27th of June, 1817), the provisions, powers, and remedies by the said recited act given to lessors and landlords in case of any tenant deserting the demised premises, and leaving the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, shall be extended to the

1855.

EDWARDS

v.

HODGES.

1855.

EDWARDS
v.
HODGES.

case of tenants holding any lands, tenements, or hereditaments at a rack-rent, or where the rent reserved shall be full three fourths of the yearly value of the demised premises, and who shall be in arrear for *one half year's rent* (instead of for *one year*, as in the said recited act is provided and enacted), and who shall hold such lands and tenements or hereditaments under any demise or agreement either written or verbal, *and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent*, who shall be in arrear for *one half year's rent*, instead of for *one year*, as in the said recited act is provided and enacted." That statute is not even now mentioned in the margin of the plea. [*Jervis*, C. J. It is recited in the 3 & 4 Vict. c. 84, s. 13.] The next question is, whether the addition of the last-mentioned statute in the margin of the plea, was an amendment which is authorised by the 15 & 16 Vict. c. 76, s. 222. (a) [*Jervis*, C. J. I offered to adjourn the trial, and to make the defendant pay costs.] It is at the least extremely doubtful whether under the above section the court or a judge has power to add a plea, which this in effect was. [*Maule*, J. I think that has been done. Adding a plea surely is amending a defect or error in a proceeding.] The matter was discussed in this court, in a case of *Lewis v. Clifton*: but no decision was come to, the parties having compromised.

(a) "It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or

not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

JERVIS, C. J. It seems to me that it would be a reproach to the law, if the mere omission of a statute from the margin of the plea were to make the proceedings irremediably bad. If the omission were calculated to mislead the plaintiff as to the real nature of the defence intended to be set up, it would be but just that he should be allowed ample time to inform himself upon the subject. Of all others, I think this is peculiarly a case for the operation of the statute. Upon the other point, however, I think there ought to be a rule.

1855.
EDWARDS
v.
HODGES.

The rest of the court concurring,

Rule nisi accordingly.

Byles, Serjt, and *Raymond*, in Michaelmas Term last, shewed cause. The simple question is, whether, in the case of deserted premises, the landlord can adopt the summary remedy given by the statutes, where there is no reservation of a right of re-entry on non-payment of the rent. The case before Lord Kenyon, cited in Woodfall, assumes, that, as the proceeding under the 11 G. 2, c. 19, s. 16, was given in substitution for ejectment, and as ejectment could only be brought where there was a power of re-entry, the statute did not apply to cases where there was no proviso for re-entry. That case is the only authority for so limited a construction of the statute; for, in the subsequent case of *Ex parte Pilton*, Lord Ellenborough merely observes that Lord Kenyon so decided: it was not necessary for him to express any opinion of his own. It is submitted that Lord Kenyon's view was not correct. The preamble of a statute may be looked at for the purpose of aiding the construction of doubtful words in the enacting part; but it cannot control them where they are clear and unambiguous. Besides, it is a remedial statute, and therefore full effect

1855.

EDWARDS
v.
HODGES.

must be given to the operative words. [*Maule, J.* In *Copeman v. Gallant*, 1 P. Wms. 314, the Lord Chancellor (Lord Cowper) says,—“I can by no means allow the notion that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow, or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise and of themselves import; which (with some heat) his Lordship said was a ridiculous notion; and instanced in the Coventry Act, 23 Car. 2, c. 1, which, if it had recited the barbarity of cutting Coventry’s nose, and the enacting clause had been general, viz. against the cutting of *any member*, whereby the man is disfigured or defaced, that cutting of the lips, or putting out the eye, would not have been within the act, because not within the preamble.” *Jervis, C. J.* The best rule for the construction of statutes is that laid down by *Burton, J.*, in *Warburton v. Loveland*, d. *Ivie*, 1 Hudson & Brooke, 648. “I apprehend,” says that learned judge, “it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or any declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further.” The court is not bound by an erroneous expression of opinion by the legislature, unless where it takes upon itself to *declare* what the law is: *Dore v. Gray*, 2 T. R. 365. That case has been acted upon over and over again. Perhaps the strongest case of recent occurrence is the statute 17 & 18 Vict. c. 75, where the Lord Chancellor brought in a bill to clear up a doubt which had arisen as to the construction of the

rules made by this court for carrying into effect the act for the abolition of fines and recoveries, 3 & 4 W. 4, c. 74,—assuming that the court had decided that those rules were defective; whereas, the court decided no such thing, and perhaps might not have so decided at all.] At all events, the difficulty arising from the decisions upon the 11 G. 2, c. 19, s. 16, is removed by the 57 G. 3, c. 52. [*Jervis*, C. J. That statute is not in the margin of the plea.] It is recited in the 3 & 4 Vict. c. 84, s. 13, which *is* in the margin, and that is sufficient; or, if not, it may be inserted now. The statute 15 & 16 Vict. c. 76, s. 222, leaves the court no discretion, except as to the terms upon which the amendment shall be allowed. [*Jervis*, C. J. If the 57 G. 3, c. 52, had been mentioned at the trial, I should undoubtedly have allowed it to be inserted with the others. It may be done now upon terms, but it can only be upon payment of the costs of the rule, no application having been made by the defendant to amend within the first four days of the term.] The 11 G. 2, c. 19, is a remedial act; and the case is clearly within the very words and the mischief of the enacting clause. Where the four requisites concur,—viz. a holding at a rack-rent, or at a rent equal to three fourths of the yearly value; an arrear of six months' rent; a desertion of the premises by the tenant; and an absence of a sufficient distress,—the 11 G. 2, c. 19, s. 16, and 57 G. 3, c. 52, empower *two magistrates* to put the landlord into possession. Then, the 3 & 4 Vict. c. 84, s. 13, reciting and incorporating the two prior statutes,—which gives the plaintiff ample notice that the defendant justifies under them,—enables *one police-magistrate* sitting in one of the metropolitan police-courts, by warrant directed to a constable, to do what under the former acts might be done by “two or more justices of the peace.” And the 34th section of the 11 & 12 Vict. c. 43, empowers

1855.

EDWARDS
v.
HODGES.

1855. the Lord Mayor or one Alderman of the city of London,
 EDWARDS to do alone any act which by any law now in force, or
 v. by any law not containing an express enactment to the
 HODGES. contrary hereafter to be made, is or shall be directed to
 be done by more than one justice.

Prendergast and *Vernon Harcourt*, in support of the rule. The 11 G. 2, c. 19, s. 16, has received a construction in the two cases referred to,—the *Anonymous* case before Lord Kenyon, and *Ex parte Pilton*,—which has been adopted by the legislature in the 57 G. 3, c. 52, and from which it is now too late for this court to depart. The last-mentioned statute, it is true, is not a declaratory law; but it at all events shews the interpretation which the legislature put upon the former statute: and so far it is material. (a) The 3 & 4 Vict. c. 84, s. 13, does not apply to the city of London; and the 11 & 12 Vict. c. 43, s. 34, does not incorporate the 57 G. 3, c. 52. [*Jervis*, C. J., asked *Byles*, Serjt., upon what statute he relied as shewing that the power in question was conferred upon the city magistrates. *Byles*, Serjt., referred to the 3 & 4 Vict. c. 84, ss. 6, 15, and 11 & 12 Vict. c. 43, s. 34.] The 6th section of the 3 & 4 Vict. c. 84, enacts that “any two justices of the peace having jurisdiction within the metropolitan police-district shall have, while sitting together publicly in a court or room used for holding special or petty sessions of the peace in any part of the said district within the limits of their commission,—except in the divisions to be assigned to the police-courts already established,—and any two justices of the peace for the city of London

(a) It seems to have been assumed that the 57 G. 3, c. 52, was passed in consequence of the two decisions referred to. The statute, however, received the royal assent on the 27th of June, 1817, and *Ex parte Pilton* was decided on the 10th of February, 1818.

and the liberties thereof shall within the said city of London and the liberties thereof, have all the powers, privileges, and duties which any *one* magistrate of the said police-courts has while sitting in one of the said courts, by the two recited acts of the last session of parliament (2 & 3 Vict. c. 47, and 2 & 3 Vict. c. 71), or either of them: Provided always, that, whenever a new police-court shall have been established within the metropolitan police-district, and a division assigned to such court as aforesaid, such justices shall not act in that division in the execution of the two said acts, or either of them, elsewhere than at such court; and that, at any police-court at which the regular attendance of a police-magistrate shall have been ordered by Her Majesty as hereinbefore (s. 2) provided, the police-magistrate, while present in such court, shall act as the sole magistrate thereof." That section gives to any *two* justices in the city of London the powers, &c., which *one* magistrate of the police-courts has while sitting in court, under the 2 & 3 Vict. cc. 47 and 71; but not the powers conferred by s. 13 of that act. Then, the 15th section of the 3 & 4 Vict. c. 84, enacts, "that any two justices of the peace for the city of London and the liberties thereof, having jurisdiction within the city of London and the liberties thereof, shall, within the said city of London and the liberties thereof, have all the powers, privileges, and duties which *any two justices of the peace* having jurisdiction within the metropolitan police-district have within the metropolitan police-district by virtue of this act." Now, the power to view and to give possession of deserted premises, by a constable, is not given to two justices of the peace, but to the *police-magistrate* only. He is required to be always sitting in court; and it would be inconvenient that he should be called upon to leave the court for the purpose of exercising this jurisdiction: to relieve him, therefore, from that inconvenience, the legislature has enabled him to

1855.

EDWARDS
v.
HODGES.

1855.

EDWARDS
v.
HODGES.

perform this part of his duty by means of a police-constable. The 34th section of the 11 & 12 Vict. c. 43, enables the Lord Mayor or *one* Alderman to do what *two justices* may do : but two justices could not do what has been done here. It lies on the defendant to make out a statutory right to pursue the course he did : and, even if such right existed, it is not sufficiently shewn upon the record. [*Jervis*, C. J. If the statutes have through inadvertence been insufficiently referred to in the margin of the plea, we should allow them to be now inserted, on proper terms. The point is an important one, and should be, if possible, so raised as to be reviewable in a court of error.] The plaintiff had leave reserved to him to move to enter a verdict for 40*l.*, if he satisfied the court that a proviso for re-entry was necessary. [*Jervis*, C. J. As at present advised, I think a power of re-entry was *not* necessary.] The preamble to the 11 G. 2, c. 19, s. 16, recites the expense and delay to which landlords were put by recovering in ejectment. The object of the act was, not to confer any new right, not to give a right of re-entry which did not exist before, but merely to give a summary remedy. [*Jervis*, C. J. The enacting words are large.] But they are to be restrained to remedy the mischief contemplated. The opinion expressed by Lord Chancellor Cowper in *Copeman v. Gallant*, 1 P. Wms. 314, with respect to the operation of the preamble, was expressly disapproved by Lord Chief Baron Parker and Lord Hardwicke in *Ryall v. Rowles*, 1 Atk. 175, 182, and 1 Ves. 365, 371, who held the case of *Copeman v. Gallant* to be well decided on the construction of the act as restrained by the preamble. (a) [*Jervis*, C. J. The best way to interpret an act of parliament, is, to

(a) See the Editor's note to *Walker v. Burnell*, Dougl. 317; *Copeman v. Gallant*. See also *Collins v. Forbes*, 3 T. R. 316; *Ex parte Flynn*, 1 Atk. 185; *Jarman v. Woollaton*, 3 T. R. 618; *Mace v. Cadell*, Cowp. 232;

put the ordinary construction upon words that are plain and intelligible, looking at the preamble if necessary to the elucidation of the meaning of the legislature. But the preamble will not restrain plain and unambiguous words of enactment.] In *Horton v. Kilmore*, Cases tempore Hardwicke, 6, the court held themselves bound by a legislative exposition of the meaning of a prior act. [*Maule, J.* There, the second act expressly *declared* the meaning of the first. But there is nothing in the 57 G. 3, c. 52, to limit the power of the court in the construction of the 11 G. 2, c. 19, s. 16: it merely provides, that, from thenceforth, a proviso for re-entry shall not be necessary. *Jervis, C. J.* The history of the transaction seems to have been this:—In 1801, Lord Kenyon was supposed in an anonymous case to have held that the 11 G. 2, c. 19, s. 16, applied only to cases where there was a lease reserving to the lessor a power to re-enter on non-payment of the rent. Notwithstanding that decision, I find the forms in every succeeding edition of Burn's Justice omit all notice of such a power. And, in 1817, the objection being taken before Lord Ellenborough, in *Ex parte Pilton*, 1 B. & Ald. 369, his lordship observes,—“The 16th clause says nothing about a power of re-entry.” He then goes on,—“It is true, there must be in fact such a power, *according to the case cited as determined by Lord Kenyon.* But that power does appear by the affidavits to exist in this case.” That can hardly be called an expression of approval of the doctrine ascribed to Lord Kenyon. In this state of things, the 57 G. 3, c. 52, was passed, probably occasioned by the alarm created by such a construction of the former statute. *Maule, J.* In passing the 57 G. 3, c. 52, the legislature were not in any degree interfering with the construction of the 11 G. 2, c. 19; they were altogether dealing with the future. It is not treating the legis-

1855.

EDWARDS
v.
HODGES.

1855.

EDWARDS
v.
HODGES.

lature fairly to say that the language of the 57 G. 3, c. 52, leads to an inference that they thought that a power of re-entry was necessary to bring a case within the 11 G. 2, c. 19.] There had been two cases, in one of which it was decided, in the other assumed, that a proviso for re-entry was necessary under the 11 G. 2, c. 19; and then an act is passed extending the powers of the former act to cases where no right or power of re-entry should be reserved or given to the landlord in case of non-payment of rent. Lord Ellenborough evidently approves of Lord Kenyon's decision: at all events, he acts upon it. [*Crowder, J.* And its correctness is recognised by the legislature. *Williams, J.* For the purpose of this argument, it must be assumed that they were justified. *Jervis, C. J.* The plaintiff objected at the trial, that a power of re-entry was necessary. I held not; but I reserved the point. The 57 G. 3, c. 52, had not then been adverted to. Then a further objection was made, that the proper statutes were not inserted in the margin of the plea; and I allowed the defendant to insert what he asked to have inserted, viz. the 3 & 4 Vict. c. 84, s. 13, and 11 & 12 Vict. c. 43, s. 34. So far as regards the 57 G. 3, c. 52, I think you cannot have more than the costs of the rule.] The plaintiff went down to try a very different question from that which now presents itself. [*Maule, J.* A party has no right to say that he came down prepared to rest upon the precise words of the record. An amendment of the pleadings is one of the incidents of going down to trial. Now parties go down prepared for any amendment which the law allows; and the amendment may be made at any time. *Jervis, C. J.* The plea is defective in not inserting in the margin the statutes and the sections upon which the defendant must rely for his defence. I think they should now be inserted.] The report of the commissioners upon which the Common

Law Procedure Act, 15 & 16 Vict. c. 76, was founded, expounds the reason of the enactment of s. 222. The plaintiff now stands in a very different position from that in which he stood at the trial. It would lead to great abuse to allow amendment after amendment in this way, as each new difficulty may present itself. [*Crowder, J.* Was not the real question that you went down to try, whether or not the defendant was justified in turning you out?] No doubt it was. [*Jervis, C. J.* Would it not be gross injustice, that the defendant should pay you 40*l.* and the costs, when he has a perfectly good defence to the action?] The object of the rule of court requiring the statutes to be mentioned in the margin of the plea, was, that the plaintiff should have specific information as to the nature of the defence which was intended to be set up. To allow any amendment in this respect, is departing from the spirit of the rule, which no one will in future observe, if it may thus be violated with impunity.

1855.

EDWARDS
v.
HODGES.

JERVIS, C. J. It is unnecessary for us upon the present occasion to express any opinion as to the construction of the statute of 11 G. 2, c. 19, s. 16. But, in any view of the case, there are certain sections of the 3 & 4 Vict. c. 84, which are not mentioned in the margin of the plea,—an omission which deprives the defendant of the opportunity of availing himself of his full defence. Under these circumstances, we are of opinion that he should be allowed now to insert them; for, we think it would indicate a very rude state of society, and be a great reproach to the administration of justice, if the plaintiff were to be permitted to have a verdict with 40*l.* damages merely because the defendant has through ignorance or inadvertence of his advisers omitted to put two or three sections of an act of parliament in the margin of his plea. We therefore think that the

1855.

EDWARDS
v.
HODGES.

defendant should be allowed to amend his plea by inserting therein the 57 G. 3, c. 52, and the 6th and 15th and any other sections he may be advised, of the 3 & 4 Vict. c. 84, he paying the costs of the rule. And we further think, that, as the point is one of great importance,—as to the jurisdiction of the city magistrates,—the matter should undergo another argument, by one counsel on each side.

The case was accordingly now argued for the second time.

Prendergast, for the plaintiff. The power to view and to give the landlord possession of deserted premises, by means of a warrant directed to a police-constable, is, by the 3 & 4 Vict. c. 84, s. 13, given to *one police-magistrate*, upon the request of the landlord made in open court: and there was good reason for exempting the *police-magistrates* from the duty of personally viewing the premises, inasmuch as they are required by the 2 & 3 Vict. c. 71, s. 12, to attend in their respective courts from 10 o'clock in the morning until 5 o'clock in the afternoon. But it is said that the like power is given to the justices of the city of London sitting at the Mansion-House and Guildhall, by the 6th and 15th sections of the 3 & 4 Vict. c. 84. That, however, is not so. The 6th section, so far as is material to this question, enacts that "any two justices of the peace for the city of London and the liberties thereof, shall, within the said city of London and the liberties thereof, have all the powers, privileges, and duties which any one magistrate of the said police-courts has while sitting in one of the said courts, by the 2 & 3 Vict. c. 47 and 2 & 3 Vict. c. 71, or either of them." The former of these is an act for "improving the police in and near the metropolis," and the latter an act for "regulating the police-courts in

the metropolis." Both contain provisions for duties to be performed in their respective districts by police-magistrates as well as by justices of the peace who are not police-magistrates; and the 75th section of the former act provides, that, "in the construction of that act, the word 'magistrate' shall be taken to mean and include every justice of the peace appointed to be a magistrate of the police-courts of the metropolis, and also every justice of the peace acting in and for any part of the metropolitan police-district for which no police-court shall be established." And s. 76 enacts "that every such magistrate shall be empowered summarily to convict any person charged with any offence against that act, on the oath of one or more witnesses, or by his own confession, and to award the penalty or punishment therein provided for such offence; and the matter of such complaint shall be heard and determined by one of the justices appointed to be a magistrate of the police-courts of the metropolis at one of the said police-courts; or, if the offence shall have been committed or the offender apprehended in any part of the metropolitan police-district for which no police-court shall be established as aforesaid, the matter of such complaint may be also heard and determined by any two or more justices acting in and for the county in which the offence was committed or the offender apprehended." The 1st section of the 3 & 4 Vict. c. 84, reciting, that, by the 2 & 3 Vict. c. 47, it was amongst other things enacted, "that, in the construction of that act, the word 'magistrate' shall be taken to include every justice of the peace acting in and for any part of the metropolitan police-district for which no police-court shall be established, and that, if any offence against that act shall have been committed, or the offender apprehended, in any part of the metropolitan police-district for which no police-court shall be established as aforesaid, the matter of such

1855.

EDWARDS

v.

HODGES.

1855.

 EDWARDS
 v.
 HODGES.

complaint may be also heard and determined by any two or more justices acting in and for the county in which the offence was committed or the offender apprehended," — repeals those two sections: and then comes the 6th section, which gives to two justices of the peace having jurisdiction within the metropolitan police-district, while sitting publicly together in the court used for holding special or petty sessions (except in the divisions to be assigned to the police-courts), and to two justices of the peace for the city of London, all the powers, &c., which one police-magistrate has, not generally, but by the two recited acts of 2 & 3 Vict. cc. 47, 71. The statute in this respect is plain and free from ambiguity. Then the 15th section of the 3 & 4 Vict. c. 84 enacts simply that "any two justices of the peace for the city of London and the liberties thereof, having jurisdiction within the city of London and the liberties thereof, shall, within the said city of London and the liberties thereof, have all the powers, privileges, and duties which any two justices of the peace having jurisdiction within the metropolitan police-district have within the metropolitan police-district *by virtue of this act*." But the power given to a police-magistrate by the 13th section of that act, is not a power given to "any two justices" by virtue of that act: and there are many things which a police-magistrate sitting alone may do under that act, which two justices of the peace could not do. No argument can arise upon the 11 & 12 Vict. c. 43, s. 34; for, it may be conceded, that, under that provision, the Lord Mayor or any one alderman sitting at the Mansion-House or Guildhall, may do all that could formerly have been done by any two ordinary justices of the peace for the city. The 3 & 4 Vict. c. 84, throughout, carefully distinguishes between "police-magistrates" and "justices of the peace."

Byles, Serjt., contra. The 11 & 12 Vict. c. 43, s. 34, it is conceded, enables the Lord Mayor of London, or any Alderman, sitting at the Mansion-House or Guildhall justice-rooms, to do alone any act which by any law now in force, or by any law not containing any express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice. The question is, has any one or more justice or justices of the peace power to view and give possession of deserted premises by warrant directed to a police-constable? All these statutes for the regulation of the police and the police-courts must be read together as forming one code. "Where there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other:" Per Lord Mansfield, in *Rex v. Loxdale*, 1 Burr. 445, 448. The first question here is, what is meant by "justices of the peace," in the 3 & 4 Vict. c. 84. Construed literally, it clearly includes "police-magistrates." The 1st section of the Metropolitan police-act, 10 G. 4, c. 44, impowers the Crown to establish a new police-office in the city of Westminster, and to appoint "two fit persons as *justices of the peace* of the counties of Middlesex, Surrey, Hertford, Essex, and Kent, and of all liberties therein, to execute the duties of a justice of the peace at the said office, and in all parts of those several counties, and the liberties therein." So, the 2 & 3 Vict. c. 71, s. 1, reciting that it is expedient to amend the several acts now in force for the more effectual administration of justice in the office of a "justice of the peace" in the several police-offices established in the Metropolis, enacts "that the several police-courts now established (naming them) shall be continued, and that the several persons appointed to execute the duties of a *justice of the peace*

1855.

EDWARDS
v.
HODGES.

1855.

EDWARDS

v.

HODGES.

at the said courts, shall continue to execute the same there, and shall be justices of the counties of Middlesex, Surrey, Kent, Essex, and Hertfordshire, the city and liberty of Westminster, and the liberty of the Tower of London, and magistrates of the said courts, during Her Majesty's pleasure." When the act gives power to justices of the peace to do certain acts, it gives them all the powers that any justices have. [*Cresswell*, J. It may well be that police-magistrates have all the powers of justices of the peace: but it does not follow that justices of the peace have all the powers of police-magistrates.] The true meaning of the 6th section of the 3 & 4 Vict. c. 84, is, that any two justices of the peace having jurisdiction within the metropolitan police-district, and any two justices of the peace for the city of London, shall, within their respective jurisdictions, have all the powers, privileges, and duties which any one police-magistrate has, while sitting by,—that is, under the authority of,—the two recited acts of 2 & 3 Vict. c. 47, and 2 & 3 Vict. c. 71. Taking the 6th and 15th sections of the 3 & 4 Vict. c. 84, together, it is impossible to give any effect to their language, unless it is held that the legislature intended to give to two justices in each of the two jurisdictions, all the powers conferred by that act as well as by the two acts therein recited.

Harcourt, in reply, submitted, that, taking the whole of the statutes together, the power to view and deliver possession of deserted premises by warrant directed to a police-constable, was clearly created only in case of the police-magistrate, and was not intended to be conferred upon any other description of justice of the peace. The 34th section of the 11 & 12 Vict. c. 43, cannot have the effect contended for on the other side; for that would be directly in the teeth of the 33rd section, which provides that "nothing in the act contained

shall alter or affect in any manner whatsoever any of the powers, provisions, or enactments contained in the 10 G. 4, c. 44, 2 & 3 Vict. c. 47, 2 & 3 Vict. c. 71, and 3 & 4 Vict. c. 84." [Cresswell, J. To give the 34th section the effect contended for on the part of the defendant, would not necessarily be to alter or affect any of the powers, provisions, or enactments contained in the 3 & 4 Vict. c. 84: it would be merely to superadd to it that what might under that act be done by two justices, may now be done by one alone sitting at the places named.]

1855.

 EDWARDS
 v.
 HODGES.

JERVIS, C. J. I am of opinion that this rule should be made absolute; though I much regret, that, after a careful consideration of the several acts of parliament to which our attention has been drawn, I feel compelled to arrive at that conclusion. Under the 11 G. 2, c. 19, s. 16, and 57 G. 3, c. 52, where premises were deserted, and there was no sufficient distress thereon to satisfy the arrears of rent, two magistrates, upon personal view of the premises, and upon evidence of the arrears of rent, were empowered to put the landlord in possession. So stood the law down to the 3 & 4 Vict. c. 84, the 13th section of which enables a *police-magistrate* to do this by means of a warrant directed to a police-constable, instead of going in person. Many reasons might be suggested for not requiring a police-magistrate to go himself to view the premises: he is required by the 2 & 3 Vict. c. 71, s. 12, to be in attendance all day at his court. The question is, whether there is any provision which gives the like power to an alderman,—a justice of the peace for the city of London,—sitting at the justice-room at Guildhall. The clauses relied on by the defendant are the 6th and 15th of the 3 & 4 Vict. c. 84, and the 34th of the 11 & 12 Vict. c. 43. Now, I do not agree with Mr. Harcourt in the inference

1855.

EDWARDS
v.
HODGES.

which he draws from the conclusion of the 33rd section of the last-mentioned act,—“that nothing in this act contained shall alter or affect in any manner whatsoever any of the powers, provisions, or enactments contained in the 10 G. 4, c. 44, 2 & 3 Vict. c. 47, 2 & 3 Vict. c. 71, and 3 & 4 Vict. c. 84.” Enabling one justice to exercise the powers which, under the 3 & 4 Vict. c. 84, required the concurrence of two, would not be altering or affecting any of the powers or provisions of that act. But I think power is not given by the 3 & 4 Vict. c. 84 to any two justices of the peace to do what one police-magistrate is impowered to do by the 13th section, viz. view and give possession of deserted premises by means of a warrant directed to a police-constable. The 15th section may be disposed of in a word: two justices of the peace for the city of London,—or two aldermen,—are thereby empowered, within the city of London and the liberties thereof, to do all that any two justices of the peace having jurisdiction within the metropolitan police-district may do within the metropolitan police-district by virtue of that act: but the power now in question is not one which is conferred by any clause in the act upon any two justices of the peace having jurisdiction within the metropolitan police-district. The act throughout draws a marked distinction between police-magistrates and justices of the peace. It does not follow that because a police-magistrate is a justice of the peace, one who fills the latter character must necessarily be clothed with all the powers of the former. That reduces the question to what is the meaning of the 6th section of the 3 & 4 Vict. c. 84. That section enacts that “any two justices of the peace having jurisdiction within the metropolitan police-district shall have, while sitting together publicly in the court or room used for holding special or petty sessions of the peace in any part of the said district within the limits of their com-

mission, except in the divisions to be assigned to the police-courts already established, and any two justices of the peace for the city of London and the liberties thereof, shall within the said city of London and the liberties thereof have all the powers, privileges, and duties which any *one* magistrate of the said police-courts has while sitting in one of the said courts by the two recited acts of the last session of parliament (2 & 3 Vict. c. 47, and 2 & 3 Vict. c. 71), or either of them: Provided always, that, whenever a new police-court shall have been established within the metropolitan police-district, and a division assigned to such court as aforesaid, such justices shall not act in that division in the execution of the two said acts, or either of them, elsewhere than at such court; and that, at any police-court at which the regular attendance of a police-magistrate shall have been ordered by Her Majesty, as hereinbefore (s. 2) provided, the police-magistrate while present in such court shall act as the sole magistrate thereof." My Brother Byles suggests that the true meaning of that section is, that any two justices of the peace having jurisdiction within the metropolitan police-district, and any two justices of the peace for the city of London, shall, within their respective jurisdictions, have all the powers, privileges, and duties which any one police-magistrate has, while sitting by the two recited acts of 2 & 3 Vict. cc. 47, 71. It is, however, contrary to the fair and ordinary meaning of the words to say that a magistrate sits "by" an act of parliament. The meaning clearly is, that the two justices shall have all powers which the police-magistrate has while sitting in court and acting in the execution of the two recited acts. This is manifest from the language of the proviso. It seems to me, therefore, that there is nothing to confer upon one alderman sitting at the justice-room at Guildhall the power which is conferred by the 13th

1855.

EDWARDS
v.
HODGES.

1855.

EDWARDS
v.
HODGES.

section of the 3 & 4 Vict. c. 84 upon a police-magistrate while sitting in a police-court, and that consequently the rule must be made absolute.



MAULE, J. I entirely concur in the opinion expressed by my Lord Chief Justice, and do not think it necessary to add anything.

CRESSWELL, J. I am entirely of the same opinion. After a careful consideration of all the various clauses to which our attention has been called, the question at last turns upon the construction of the 6th section of the 3 & 4 Vict. c. 84. I think the view taken of it by the Lord Chief Justice is clearly correct.

WILLIAMS, J. I also entirely concur in the opinion expressed by the Lord Chief Justice: and I think that, even if the 6th section of the 3 & 4 Vict. c. 84 were capable of the construction contended for by my Brother Byles, it would not help him; for, that section speaks only of the powers and privileges which the police-magistrate *has*, and the power now in question is one which then remained to be conferred upon the police-magistrate.

Rule absolute.

1855.

BORTHWICK and Another, Appellants; WALTON and Others, Respondents.

Jan. 22.

THIS was an appeal against the decision of the judge of the county-court of Lancashire holden at Manchester.

The summons was a summons out of the district granted by the judge of the above-mentioned county-court on the 20th of October, 1854, stating that it was issued by leave of the court.

The action was brought to recover the sum of 37*l.* 8*s.* 4*d.*: and the particulars annexed to the summons shewed that the cause of action alleged was, for goods sold and delivered by the plaintiffs (the respondents) to the defendants (the appellants) to that amount.

The cause came on to be tried before the judge of the county-court in Manchester, on the return of the said summons on the 15th of November, 1854: and, upon such trial, the plaintiffs appeared by their attorney, and Elliott, one of the defendants, appeared by counsel.

The plaintiffs had for a long time carried on the business of general Manchester warehousemen, and have no other place of business than at Manchester; and the defendants have both resided at Oxford, carrying on business there.

It was proved on the trial, that, in the month of March last, a Mr. John Walton, one of the plaintiffs, was at Oxford, on his usual rounds soliciting orders, and then and there a verbal order for the goods the price and value of which this action was brought to recover, was given by Thomas Borthwick to, and received by, the said John Walton for the plaintiffs, with a direction that the same should be sent in the usual way, which had

A., carrying on business in Manchester, by his traveller sold goods to B. at Oxford, which goods were to be forwarded in the usual way, viz. by the London and North-Western Railway. The goods were accordingly packed and sent by A. to the railway-station at Manchester, addressed to B. at Oxford:—Held, that, as the order for the goods was received at Oxford, the “*whole* cause of action did not arise in Manchester, so as to give the county-court there jurisdiction to try it, under the 9 & 10 Vict. c. 95, s. 60.

1855.

BORTHWICK,
App.,
WALTON,
Resp.

always been by the London and North-Western Railway; and that, in pursuance of such order, which was communicated by the said John Walton to the plaintiffs' house at Manchester, the goods so ordered were sent by the plaintiffs by railway from Manchester, from a station within the jurisdiction of the said court, to Oxford, within the jurisdiction of the said county-court of Oxford holden at Oxford, addressed to Borthwick & Co.: and it was contended on the part of the defendant Elliott, that, as the order for the goods in question was given to and received by the plaintiffs at Oxford, within the jurisdiction of the said county-court of Oxford holden at Oxford, and not at any place within the jurisdiction of the county-court in which the plaint was issued and trial had, and as it was in consequence of such order that the goods in question were sent by the plaintiffs, the whole cause of action did not arise within the jurisdiction of the last-mentioned court; and it was objected that the *whole* cause of action should have arisen within the jurisdiction of the said court, to give the said court jurisdiction either to give leave for the issuing of the said summons or proceeding in the said cause.

On the part of the plaintiffs, it was in answer contended that the said order for the said goods, being a verbal order, did not constitute the cause of action; but, as the goods were delivered, in pursuance of the said order, from the plaintiffs' warehouse to the railway company within the district of the said court, the cause of action arose within the jurisdiction of the said court.

The learned judge held, in point of law, that the delivery of the goods in question to the railway company, addressed as aforesaid, was a delivery to the defendants; and, as the said delivery took place within the district of the said court, he had full jurisdiction to hear the

said cause, and determine the same, notwithstanding the said order was given to, and received by, the plaintiffs within the jurisdiction of the said county-court holden at Oxford: and he accordingly proceeded to determine the said cause, and gave judgment for the plaintiffs for the full amount claimed, with costs; and an order was thereupon made under the seal of the said court accordingly.

The question for the opinion of this court was,—Whether, under the circumstances above stated, the cause of action did arise within the jurisdiction of the said county-court of Lancashire holden at Manchester; and, if it did, then the judgment for the plaintiffs was to stand: but, if it did not, then the said judgment for the plaintiffs was to be set aside, and a nonsuit or a verdict or judgment for the defendants, or either of them, as the court should direct, should be entered in lieu thereof.

Griffiths, for the appellants. (*a*). The 60th section of the 9 & 10 Vict. c. 95, upon which this question arises, enacts that the summons “may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action

1855.

BORTHWICK,
App.,
WALTON,
Resp.

(*a*) The points marked for argument on the part of the appellants, were:—“That the order, direction, and delivery as in the case mentioned, were the cause of action, and the delivery as in the case mentioned having been in pursuance of the said order, and in accordance with the said direction, the order and direction form, or one of them forms, part of the cause of action;

and that the determination of the county-court that it had full jurisdiction to hear the cause and determine the same, because the delivery in the said case mentioned was a delivery to the defendants within the district of the said county-court, and notwithstanding the said order was given and received without such district, was wrong in point of law.”

1855.

BORTHWICK,
App.,
WALTON,
Resp.

brought, or, by leave of the court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business at some time within six calendar months next before the time of the action brought, or *in which the cause of action arose*, such summons may issue in either of such last-mentioned courts." It has repeatedly been held that "the cause of action" here, means "the *whole* cause of action." In the present case, the order, which was a material part of the cause of action, was given at Oxford. [*Cresswell*, J. The cause of action was, the delivery of the goods at the railway-station at Manchester: part of the evidence, no doubt, would be the order.] The plaintiffs would be bound to allege and to prove a request. In *Buckley v. Hann*, 5 Exch. 43, a bill of exchange was drawn and accepted, and the indorser put his name to it, within the city of London, but it was delivered to the indorsee in the county of Middlesex: and it was held, that the cause of action did not arise within the city of London; Parke, B., saying,—“The statute requires the cause of action, that is, the whole cause of action, to arise in the city. In this case it did not: until the bill was *delivered* to the plaintiff, no cause of action arose from the indorsement to him.” So, in *Wilde v. Sheridan*, 21 Law Journ., N. S., Q. B. 260, the plaintiff, who resided at Norwich, drew there a bill of exchange on the defendant, who resided in London: and the latter accepted the bill in London, and sent it to the plaintiff at Norwich: and it was held by Coleridge, J., in a well-considered and well-expressed judgment, that the whole cause of action did not arise in Norwich, and therefore that the judge of the county-court at Norwich had no jurisdiction to try it. Again, in *Betteley v. Buck*, 13 Jurist, 368, in an action by the indorsee against the drawer of a bill of exchange for a sum less than 20*l.*, the defendant traversed the notice of dishonor, and it appeared at the

trial that the bill had been drawn and indorsed within the jurisdiction of the county-court where the defendant resided, but that the notice of dishonor was given elsewhere; and it was held that the plaintiff was deprived of his costs by the 8 & 9 Vict. c. 95, s. 129. And in *Huth v. Long*, 19 Law Journ., N. S., Q. B. 325, on a motion to enter a suggestion to deprive the plaintiff of costs in an action by a second indorsee of a bill of exchange against the drawer, it was held, that, in order to shew that the cause of action arose in *some material point* within the jurisdiction of a county-court, it is sufficient to prove that notice of dishonor was given to the defendant within the jurisdiction. "It was a material part of the cause of action," said Coleridge, J., "that the defendant should have notice of the non-payment of the bill by the acceptor, and that notice the plaintiff gave to the defendant at the place where the defendant resided." [*Maule*, J. You contend that the plaintiff cannot sue in the place where he performed the contract, if part of the contract is entered into in another place.] In a case of *In re Walsh*, 1 Ellis & B. 383, a plaint was levied in the county-court of Liverpool, by leave of the judge (under s. 60) against a defendant not resident within the jurisdiction. The particulars were, for not delivering a cargo of corn bought by the plaintiff of the defendant by a contract in writing. On a rule for a prohibition, it appeared by the affidavits that the plaintiff at Liverpool, within the jurisdiction, made a contract with a broker who professed to act for the defendant, in these terms,—“Sold the cargo of corn per Thane of Fife, now at Queenstown, at 27s. per quarter, including cost, freight, and insurance to a safe port in the united kingdom. Payment, cash in exchange for shipping documents and policy of insurance.” Queenstown was out of the jurisdiction, and so was the ship. The plaintiff requested that the ship should be

1855.

 BORTHWICK,
 App.,
 WALTON,
 Resp.

1855.

BORTHWICK,
App.,
WALTON,
Resp.

sent to Dublin, a port also out of the jurisdiction. The defendant sold the cargo to another person, delivered him the shipping documents, and caused the cargo to be delivered to him : and it was held that the non-delivery of the cargo was a breach of the contract and a cause of action, but out of the jurisdiction of the county-court of Liverpool, and consequently, that the prohibition must go. So, in *Barnes v. Marshall*, 21 Law Journ. N. S., Q. B. 388, a carrier and wharfinger residing at Swindon, in Wiltshire, agreed in writing with Marshall, who resided in Surrey, to barge timber from Swindon Wharf to London, at any wharf there, at 16s. per ton, to include all charges except wharfage. It was necessary to haul the timber from the place where it lay to be loaded on board the barges, and, at times, when the horses of Marshall were not on the spot, the carrier supplied horses, and hauled the timber. A plaint was afterwards levied in the county-court for the district of Swindon, against Marshall, for 50*l.*, the balance of account claimed by the carrier, including two items, amounting to 1*l.* 16s., for hauling : and it was held, that the hauling of the timber and the carriage of it to London constituted but one cause of action ; and that, as such cause of action did not arise until the delivery of the timber in London, the judge of the Swindon county-court had no jurisdiction to try the plaint under the 9 & 10 Vict. c. 95, s. 60. [*Jervis*, C. J. That case is in substance the same as *In re Walsh*.] In *Re Fuller*, 2 Ellis & B. 573, A. by will bequeathed to his servant F., "should my executors think proper," 20*l.*, "conditional on his continuing to conduct himself faithfully in all respects," and appointed executors : the will was made in the district of the county-court of K., and the testator died there : the executors renounced probate ; and M. took out letters of administration with the will annexed in the Prerogative Court of the Archbishop of Canterbury : M. resided in London ; F. by leave of the judge of the county-court

of K. sued M. in that court for the 20l.: on a rule to set aside a judge's order for a prohibition,—it was held that the grant of letters of administration was part of the cause of action, and that the judge of the county-court of K. had not, under the 9 & 10 Vict. c. 95, s. 60, jurisdiction in respect of it over M., who was not within his district; and on that ground the rule to set aside the judge's order was discharged. Lord Campbell there says,—“It is not made out that the cause of action arose within the district.” And Coleridge, J., says,—“I think it quite clear that the grant of the letters of administration, and the acceptance of them by the defendant are in this case essential parts of the cause of action.” [*Jervis* C. J. This point seems scarcely to have been considered there.] That the *order* is an essential part of the cause of action, is clear from *Smith v. Rolt*, 9 C. & P. 696. Here, the order given at Oxford was an essential part of the cause of action: but for that, there would have been no cause of action at all: it was the very foundation of the cause of action. [*Maule*, J. A thing may be the foundation of a cause of action without being part of it.] The 128th section, which gives concurrent jurisdiction, shews that the legislature intended the *whole* cause of action, when dealing with summonses to be issued against persons residing out of the jurisdiction: see *Ghislin v. Deen*, 13 Jurist, 82. The object of the legislature evidently was, to save expense to parties: it was never intended that the 60th section should apply to the case of a contract for the sale of goods entered into in one part of the kingdom, and perfected by delivery at another and distant part.

1855.

 BORTHWICK,
 App.,
 WALTON,
 Resp.

Aspland, for the respondents. (a) The 60th section

(a) The points marked for argument on the part of the respondents, were,—	“That the cause of action sufficiently arose within the jurisdiction of the county-court:
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1855.

BORTHWICK,
App.,
WALTON,
Resp.

must be read in connection with the 128th and 129th: and, so reading it, it manifestly means, not the whole cause of action in the sense contended for on the other side, but such cause of action as entitles the plaintiff to recover. [*Maule, J.* Was not the giving of the order for the goods a part of the cause of action?] Not for the purpose of s. 60: it is part of the foundation, but not of the cause of action. [*Maule, J.* The judge of the county-court seems to have thought that the order, being a mere *verbal* order, had nothing to do with the case. Now, it seems to the court, and probably to you also, that, whether the order was written or verbal makes no difference. But you say, that, suppose there had been a contract in writing at Oxford, and the plaintiffs performed their part of it, viz. by the delivery of the goods, at Manchester, the *whole cause of action* would arise in the latter place.] It is not intended to carry the argument quite so far as that. But there are two or three cases which seem to shew that the cause of action arises in the place where the goods are delivered. Thus, in *Copeland v. Lewis*, 2 Stark. N. P. C. 83, the defendant, who resided at Aberystwith, in Cardiganshire, gave an order to the traveller of the plaintiffs (who were dealers in London) at Aberystwith for a chest of tea: nothing was said as to the place of delivery, but the tea was in fact delivered by the plaintiffs to a carrier in London, to be conveyed to the defendant. Jervis, for the plaintiff, contended that the cause of action arose in

“That the facts stated in the case shewed that the judge had jurisdiction to try the action:

“That the fact of the delivery of the goods to the railway company at the station within the district of the court, conferred jurisdiction:

“That a judgment is to be presumed to be valid until the contrary is shewn; and that it did not appear affirmatively on the case that the cause of action did not arise within the district, wholly, or sufficiently to confer jurisdiction, or that the judge had no jurisdiction.”

London, where the goods were delivered ; and he referred to *Harwood v. Lester*, 3 B. & P. 617, where goods having been delivered to a carrier in London, according to an order of the defendants in Leicestershire, it was held that an action could not be maintained in the county-court of Leicestershire, and therefore the court of Common Pleas refused to stay the proceedings in an action in that court, although the debt amounted to less than 40s. : and where Heath, J., intimated that authorities were to be found in the books, to shew, that, where goods are sent from one county into another, the cause of action is to be considered as arising in the county from which they are sent, and not in that where they are delivered : and he also cited *Dutton v. Solomonson*, 3 B. & P. 582, to shew that a delivery of goods by the vendor on behalf of the vendee to a carrier not named by the vendee, is a delivery to the vendee. And Lord Ellenborough said that he acceded to the opinion of Heath, J., and that, "where nothing was said as to any carrier, according to common sense it is to be understood that the goods are to be delivered in the most usual and convenient way." [Cresswell, J. It would rather seem that there was no delivery to the defendant at all there, until the goods reached Aberystwith.] It was assumed that a delivery to the carrier in London was a delivery to the defendant. In *Huxham v. Smith*, 2 Campb. 21, it was ruled by Lord Ellenborough, that, if a merchant abroad orders goods of a shopkeeper within the city of London, to be put on board a ship lying beyond the limits of the city, and the shopkeeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the Mayor's court, as a debt arising within the city. [Cresswell, J. In that case, as well as in *Harwood v. Lester*, the order was received in London. Here, the order was received at Oxford. *Maule, J.* Under the old county-court system, the *whole* cause of

1855.

 BORTHWICK,
 App.,
 WALTON,
 Resp.

1855.

BORTHWICK,
App.,
WALTON,
Resp.

action must have arisen within the jurisdiction. Would the order be no part of the cause of action?] In *Emery v. Bartlett*, 2 Lord Raym. 1555, 2 Stra. 827, it was held, that, in an action in an inferior court, by the payee of a note against the maker, though the declaration states that the note was made for value received, it need not state that the value was received within the jurisdiction of the inferior court: nor, in an action in an inferior court upon an account stated, need it be alleged that the sums in arrear concerning which the parties accounted were in arrear within the jurisdiction of the inferior court. [*Maule, J.* Suppose there was the most ample proof of the delivery of the goods to the defendants at Manchester, you must still have evidence of the order.]

Griffiths was not called upon to reply.

JERVIS, C. J. It has been decided over and over again that the "cause of action" in the 9 & 10 Vict. c. 95, s. 60, means "the *whole* cause of action." I therefore think the county-court judge in this case was wrong in assuming jurisdiction. The whole cause of action clearly did not arise in Manchester. The mere delivery of the goods at the railway-station there was not enough: the plaintiffs were bound further to prove the order; and that was given and received at Oxford. The appeal, therefore, must be allowed.

MAULE, J. I also think that there should be a non-suit in this case, on the ground stated by the Lord Chief Justice. Upon the critical construction of the words of the 60th section, as well as upon the spirit of the enactment, I think it clearly means the *whole* cause of action. And there is good reason for this. A defendant is liable to be sued in the place where he resides, and where the whole contract or cause of action arises.

That is a thing which he can and is bound to take notice of: and it is convenient. The words of the section are plain and simple. When the legislature meant to deal with a *part* of the cause of action,—as in s. 128,—they knew how to express themselves. I think we are bound by the decisions of the courts of Queen's Bench and Exchequer to which we have been referred; and more especially by the cases of *Buckley v. Hann*, 5 Exch. 43, and *Re Fuller*, 2 Ellis & B. 573, in which latter case, the court of Queen's Bench thought the letters of administration an essential part of the cause of action. Everything that is requisite to shew the action to be maintainable, is part of the cause of action.

1855.

 BORTHWICK,
 App.,
 WALTON,
 Resp.

CRESSWELL, J., and WILLIAMS, J., concurred.

Judgment of nonsuit. (a)

(a) See *Hernaman v. Smith*, 10 Exch. 659. The defendant offered a reward of 20*l.* to be paid on conviction of any person for stealing sheep. The defendant apprehended one Rock at Newnham, in the county of Gloucester, on a charge of sheep-stealing; and Rock was tried and convicted at the next Hereford assizes.

And the court of Exchequer held, on the authority of the principal case, that the whole cause of action for the promised reward did not arise within the jurisdiction of the county-court at Newnham, the conviction (which took place out of the jurisdiction) being an essential part of it.

1855.

BOWES v. The Right Hon. THOMAS HENRY BARON
RAVENSWORTH.

Jan. 22.

By an inclosure-act, reciting that the defendant was lord of the manors of A. and B., it was enacted that nothing therein contained should be construed to defeat or prejudice his rights as such lord; but that the lord, his heirs and assigns, should hold and enjoy all manorial rights, and also all mines, minerals, and quarries, &c., belonging to the said manors, in as full and ample a manner as if the act had not been made; "and also full and free liberty at all times hereafter of making, &c., and of granting

THIS was an action brought by the plaintiff against the defendant for the purpose of trying a right of way claimed by the defendant for the conveying of coke over the plaintiff's land; and, by consent of the parties, and by order of Maule, J., made on the 8th of November, 1854, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court:—

The piece of land over which the defendant claims a right of way to carry coke, is in the possession of the plaintiff, and is in Blackburn Fell, and parcel of the manor of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, in the county of Durham, and was formerly part of a common or waste land called Blackburn Fell, since inclosed in pursuance of an act of parliament passed in the 41 G. 3 (c. cxliv.), intituled "An act for dividing, allotting, and inclosing certain commons and other commonable lands in the parochial chapelries of Lamesley and Tanfield, or one of them, in the county of Durham," a copy of which accompanied the case.

By the award of the commissioners appointed and

to any other person or persons any waggon-ways or other ways in, over, or along the commons or waste land (intended to be allotted and inclosed), and to do every other act now in use, or which shall hereafter be used or invented, which shall be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the said last-mentioned commons, &c.; *and also for the leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever:*—

Held, that the words "produce of any other mines and minerals" did not mean the produce of mines and minerals *other than coals*, but the produce of mines and minerals other than the "mines, minerals, and quarries" before mentioned; and, consequently, that the defendant had a right to use a railway constructed by him under the power so given to him, for the purpose of carrying coke, such coke not being made from coal worked out of the waste which was the subject of the inclosure.

acting under that act, dated the 13th of March, 1818, the said piece of land was allotted to the Rt. Hon. John Bowes, Earl of Strathmore (from whom the plaintiff derives his title), in full of his proportion and interest in the commons wherein he was entitled to right of common.

1855.

BOWES
v.
Lord RAVENSWORTH.

By the same award, an allotment was made to the defendant (then Sir Thomas Henry Liddell), as lord of the manors of Ayton and Ravensworth, in the following terms:—"We do hereby set out, allot, appoint, and award unto and for the said Sir Thomas Henry Liddell, Bart., and his successors, as lord of the manor of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, in full compensation and satisfaction of his and their right and interest of, in, and to the soil of the said common, moors, or tracts of waste land, and for his consent to the said division, allotments, and inclosure, one full sixteenth part in value (quantity, quality, and situation considered) of and in the commons, moors, or tracts of waste land called Blackburn Fell, Burden Moor, Headley Fell, and Beamish East Moor, otherwise part of Blackburn Fell, respectively, 112*a*. 2*r*. 12*p*. of land in one entire plot, as the same is now staked and set out by stakes and land-marks, situate on the said Blackburn Fell."

The following clause in the said act (s. 40) bears on the present case:—"Provided always, and be it further enacted, that nothing in this act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Sir Thomas Henry Liddell, as lord of the manors of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, his heirs or assigns, or any of them, of, in, and to the seignory and royalties incident and belonging to the said manors; but that the lord of the said manors, his heirs and assigns, shall and may, from time to time, and at all times

1855.

BOWES

v.

LORD RAVENSWORTH.

hereafter, hold and enjoy all courts, perquisites, and profits of courts, and services, and all yearly and other rents and acknowledgments reserved and usually paid, and which are due and demandable for all, any, or every of the houses, buildings, cottages, intacks, or inclosures now built, made, being, or standing in or upon the said commons, moors, or tracts of waste land, or the boundaries thereof, or in or upon any ground formerly part of the said commons, moors, or tracts of waste land now held or enjoyed in severalty, and which heretofore had been, or which ought to be paid, made, or performed by the owners or possessors for the time being of such houses, buildings, or cottages, or of any of the intacks or inclosures heretofore parcel of the said commons, moors, or tracts of waste land, and now held and enjoyed in severalty; and also all waifs, strays, estrays, mines, minerals, and quarries, and all royalties jurisdictions, matters, and things whatsoever to the said manor of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, incident, belonging, or appertaining (other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said commons, moors, or tracts of waste land called Blackburn Fell and Burdon Moor, and other than and except the coal-mines and seams of coal within and under that part of the said commons, moors, or tracts of waste land called Blackburn Fell), in as full, ample and beneficial a manner to all intents and purposes, as he or they could or might have enjoyed the same if this act had not been made; and also full and free liberty at all times hereafter of making, laying, repairing, and using, and of granting to any other person or persons, any waggon-way or waggon-ways, or other way or ways whatsoever, in, through, over, or along the said commons, moors, or tracts of waste land called Blackburn Fell and Burdon Moor, and in, through, over,

and along the said town fields and stinted pasture, called Ravensworth Four Fields, and Ravensworth South Pasture, or any part thereof, and, for that purpose, to take away and remove so much of any hedges, fences, or other obstructions thereon, and to do every act either now in use or which shall hereafter be used or invented, which shall be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the said last-mentioned commons, moors, or tracts of waste land, and town fields and stinted pasture respectively (other than and except as aforesaid); and also for the leading, carrying, and conveying the coals, and the produce of any other mines and minerals, from or under any other lands and grounds whatsoever,—he, the said Sir Thomas Henry Liddell, or his lessees or assigns, or the person or persons using and enjoying such liberties and privileges, making and paying such satisfaction for damage and spoil of ground, as hereinafter is mentioned.”

Under the powers and reservations contained in the above clause, the defendant had lately,—within the last two years,—constructed a railway over that part of Blackburn Fell which was allotted to the Earl of Strathmore as before mentioned; and the defendant had used the said railway for the purpose of carrying and conveying *coal* along the same. His right to do so is not in dispute. But he has used, and claims the right of using, the said railway for the purpose of carrying and conveying *coke* along it,—such coke not being made from coal worked out of Blackburn Fell, and being carried and conveyed for the purpose of sale and shipment in the river Tyne. The plaintiff disputes the right so claimed.

The question for the opinion of the court, is, whether, under the facts stated, the defendant has such right to carry *coke* along the said railway.

1855.

BOWES
v.
Lord RAVENS-
WORTH.

1855.
 BOWES
 v.
 Lord RAVENSWORTH.

Bramwell (with whom was *V. Williams*), for the plaintiff. The liberty reserved or granted to the defendant by the inclosure act of 41 G. 3, c. cxliv, s. 40, of making and using, and of granting to any other person, any waggon-way or other way whatsoever over the lands called Blackburn Fell, for the purpose of winning, working, leading, and carrying away the mines, minerals, and quarries within and under certain lands therein mentioned, and also for leading, carrying, and conveying the coals and the produce of any other mines and minerals from and under any other lands and grounds whatsoever, does not, it is submitted, confer on the defendant the right of carrying, or of authorising the carrying, coke over the lands called Blackburn Fell. The uncontroverted facts of the case are these:—By the award of the commissioners under the Lamesley and Tanfield inclosure-act, certain portions of common land were allotted to the defendant as lord of the manor, and also to those under whom the plaintiff claims,—the act reserving to Lord Ravensworth two separate rights; one, the right of taking mines and minerals; the other, a right to make or grant ways over the land for the purpose of carrying away the said mines or minerals, “and also for the purpose of leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever.” The question is, whether the act gave the defendant a right to carry coke,—in other words, whether “coke” is “coal?” [*Cresswell*, J. The words are, “the coals, and the produce of any other mines and minerals.” Could he have carried limestone?] That would be the produce of another “mine.” [*Jervis*, C. J. What do you understand by “mine?”] The underground works. [*Jervis*, C. J. That cannot be. The section (40) reserves to the lord, his heirs and assigns, the right to take all mines and minerals.] Not

in this part of the section. The preamble to the act recites that Lord Ravensworth, "as lord of the manor of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, is seised of or entitled to the soil and royalties of and within the said commons, moors, or tracts of waste land called Blackburn Fell and Burden Moor respectively (except only the coal-mines and seams of coals within and under the said common, moor, or tract of waste land called Blackburn Fell); and is also seised of or entitled to all the coal-mines and seams of coal, and all other mines, minerals, and quarries within and under the said town fields and stinted pasture called Ravensworth Town Fields and Ravensworth South Pasture; and that Lord Ravensworth and Sir John Eden, Bart., as lords of the manor of Kibblesworth, are seised of or entitled to the soil and royalties of and within the common, moor, or tract of waste land called Kibblesworth Common; and that Lord Ravensworth, as lord of the said manors of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley aforesaid, and the said Sir John Eden, as lord of the manor of Beamish aforesaid, claim respectively, or the one of them, to be seised of or entitled to the soil of the several commons, moors, or tracts of waste land which are called or known by the several names of Hedley Fell and Beamish East Moor, otherwise part of Blackburn Fell aforesaid." Then the 40th section, intending to reserve certain of those rights, enacts that nothing in the act shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of Lord Ravensworth, as lord of the manors of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, his heirs or assigns, or any of them, of, in, and to the seignory and royalties incident to the said manors; but that the lord of the said manors, his heirs and assigns, shall and may from time to time and at all times hereafter hold and enjoy

1855.

BOWES
v.
Lord RAVENSWORTH.

1855.
BOWES
v.
Lord RAVENS-
WORTH.

all courts, &c., and also all waifs, &c., *mines, minerals,* and *quarries, &c.*, to the said manors incident, belonging, or appertaining, in as full, ample, and beneficial a manner to all intents and purposes as he or they could or might have enjoyed the same if this act had not been made; and also full and free liberty at all times hereafter of making, laying, repairing, and using, and of granting to any other person or persons any waggon-way or other way in or along the said commons, &c., and to do every act either now in use or which hereafter shall be used or invented, which shall be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the last-mentioned commons, &c., and also for the leading, carrying, and conveying the coals, and the produce of any other mines and minerals, from or under any other lands and grounds whatsoever." The court will construe this as they would any other contract between the parties. [*Jervis, C. J.* It must be borne in mind, that, at the time of the passing of that act, coke was not, as it now is, an article of extensive commerce.] Unless "coke" is "coal," the defendant has not the right he claims. That it is not, is obvious. By combustion it has lost many of the properties and constituent parts of coal. It is chemically changed. Coke, as coke, is not the produce of any mine. [*Jervis, C. J.* It cannot be denied that it is the produce of a mineral.] That cannot be the correct reading of the section: it means the raw produce, not operated upon in any way. The defendant can have no right to manufacture anything on the land, such as smelting ore, or the like. It was merely intended to give him a way-leave for the purpose of carrying the produce of mines in their native state.

Watson (with whom was the Hon. *A. Liddell*), for the defendant. The liberty reserved to the defendant by the 40th section of the act of parliament in question confers on him the right of carrying and of authorising the carrying of coke over the lands called Blackburn Fell. "Coke" is "coal" within the meaning of this act. It is not a manufacture of any kind; it is nothing more than baked coal. [*Jervis*, C. J. If you were driven to maintain the proposition that coke is coal, you would have some difficulty; the two substances are chemically different. The reservation in question is a grant of a way-leave; and its words are to be taken most strongly against the grantor,—*The Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 968. It is quite an ordinary proceeding in modern times to convert coal into coke at the pit's mouth. The defendant's right to use the way is not restricted to the carrying of mines and minerals, the produce of the allotted lands, but extends also to the carrying of coals and *the produce of any other mines and minerals* from or under any other lands or grounds whatsoever. [*Cresswell*, J. How does the power given to the defendant by the 40th section affect his right to make a railway for any purpose he pleases? *Maule*, J. Would not a right to carry the produce of a forest include a right to carry the charcoal?] Undoubtedly it would.

1855.

BOWES
v.
Lord RAVENS-
WORTH.

Bramwell, in reply. The rule that the words of a grant are to be taken most strongly against the grantor, is not to be had recourse to until all other modes of ascertaining the meaning of the parties have been exhausted. The special right given to the defendant by s. 40 to lay down waggon-ways, negatives the existence of any independent general right. Nor will the general authority given to him to do every act either now in use, or which shall hereafter be used or invented, which shall

1855.

 BOWES
 v.
 Lord RAVENS-
 WORTH.

be necessary to be done for the purpose of winning and carrying away the said mines and minerals within and under the allotted lands, and also for the purpose of carrying and conveying the coals and the produce of any other mines and minerals from or under any other lands, confer any such right. "Other mines and minerals" must of necessity mean, other than coals; otherwise the words are insensible. [*Maule, J.* Coke consists of coal with some gases expelled from it. Might not malt be properly said to be the produce of a farm?] No more than wine is the produce of a vineyard, or any article constructed of wood is the produce of a forest. The compensation clause, s. 45, which provides for the assessment of damages for injury sustained by any person in his allotment, by the searching for, winning, or working the said mines and quarries therein, or the leading or carrying away of the coals, lead, minerals, stones, or other things to be gotten thereout, or out of any other mines or quarries, or by the making, laying, repairing, or using of waggon-ways, &c., tends to elucidate the meaning of the 40th section. [*Maule, J.* That clause does not hurt you; nor do I think it at all aids your argument.]

JERVIS, C. J. I am of opinion that our judgment in this case should be for the defendant: and I think that the necessity which drove Mr. Bramwell to the very refined argument he has urged upon the critical construction of the 40th section of the act in question, shews that we can arrive at no other conclusion; for, if every word of that section were examined and construed with grammatical accuracy, insuperable difficulties would present themselves on both sides. I think, therefore, we must look at the general scope and intention of the act, and put the best construction we can upon it. It is clear that the framers of the act did not

mean in any degree to interfere with the rights of the defendant as lord of the manors mentioned in the preamble of the act: the 40th section expressly provides that he, his heirs and assigns, shall hold and enjoy all courts, &c., and all waifs, strays, estrays, *mines, minerals*, and quarries, &c., and all things whatsoever to the said manors belonging, in as full, ample, and beneficial a manner to all intents and purposes as he or they could or might have enjoyed the same if that act had not been made; and it confers upon him the right of making and using, and of granting to any other person, any waggon-way or other way in, through, over, and along the commons and wastes, and other works necessary for the winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the said common or waste land so reserved to him, and also for the carrying and conveying the coals and the produce of any *other* mines and minerals from or under any *other* lands and grounds whatsoever. The defendant clearly had a right to carry along the way so made the produce of the mines under the commons or waste lands, in any form he might think fit: and, having the way, what is there to restrict him in the use of it? The intention, I think, was, that the defendant should have the right to carry, not only the mines and minerals from under the commons to be inclosed, but also the coals and the produce of any other mines and minerals from or under any other lands,—other than those before mentioned. I do not think the repetition (perhaps unnecessary) of the word “other” at all alters its meaning in the previous part of the clause. I think, therefore, upon the fair construction of the act of parliament, the defendant was entitled to use the way in question for the conveyance of coke the produce of coal taken from mines other than those in Blackburn Fell, and consequently that he is entitled to judgment upon this special case.

1855.

BOWES
v.
Lord RAVENS-
WORTH.

1855.
BOWES
v.
Lord RAVENH-
WORTH.

MAULE, J. I am of the same opinion. The intention of the act is expressed in very copious language. But, considering the object the 40th section had in view, viz. to retain to the lord of the manor, his heirs and assigns, so far as was consistent with the rights conferred by the act upon other persons, all his rights with respect to minerals, and principally coals, and construing it with reference to that, the evident intention of that section was, to reserve to the lord all his rights as to the mines and minerals under the lands to be allotted and inclosed under the powers of the act, as amply as he enjoyed them before; and, for that purpose, he is empowered to make and to grant waggon-ways and other ways for the conveyance of the produce of his own mines, and also for the purpose of carrying away the coals and the produce of any other mines and minerals from or under any other lands or grounds whatsoever. It seems to me that the repetition of the word "other" was necessary: it meant to extend the right to all sorts of mines and minerals other than the particular mines and minerals before mentioned, but not to restrain it to the mines and minerals the produce of those mines. It seems to me, therefore, that the general scope of the section, and the precise words critically looked at, concur in shewing that the construction which has been insisted upon by Mr. Bramwell is not that which ought to be adopted. I therefore agree with my Lord Chief Justice in thinking that the defendant is entitled to our judgment.

CRESSWELL, J. I am entirely of the same opinion. The earlier parts of the 40th section having reserved to the defendant, as lord of the manors mentioned in the preamble, all his manorial rights, and all mines, minerals, and quarries, &c., incident or belonging thereto, in as full, ample, and beneficial a manner as if the act had

not been made, the latter part gives him power to make and use, and to grant, any waggon-ways or other ways over the land which was the subject of the allotment and inclosure, and to do every act, either then in use, or which should thereafter be used or invented, which should be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the last-mentioned commons (the commons and waste lands to be inclosed); and then the section goes on "and also for the leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever." I think the act intended to give the defendant as ample power to carry on the way in question the coals and the produce of any other mines and minerals gotten in any other lands or ground, as he had to carry the produce of the mines on the wastes themselves; and that the word "other" was not unnecessarily repeated: it was probably intended to exclude the bringing of minerals along the way which might be imported from foreign countries. I think it cannot be denied that "coke" is the produce of a mine within the meaning of this act. For these reasons, I am of opinion that the defendant is entitled to our judgment.

1855.

BOWES
v.
LORD RAVENS-
WORTH.

WILLIAMS, J. I am of the same opinion, and for the reasons already given by the rest of the court.

Judgment for the defendant.

1855.

BELL and Another, Assignees of HENRY MILES HAVILAND, a Bankrupt, *v.* YOUNG.

Jan. 19.

A case stated by an arbitrator for the opinion of the court, found, that A., a farmer, who was under covenant with his landlord to "consume the whole of the turnips and other roots upon the premises;" that part of the stock kept by A. upon the farm consisted of cows; that his intention in keeping them was to sell a considerable quantity of the milk obtained from them, which he did by daily sending a man to sell and deliver it at a neighbouring town to customers some of whom were regular and others chance customers; that he sometimes made butter from the surplus milk, and sold it in like manner; that keeping cows to the extent A. did, was a good, proper, and husbandlike, as well as a profitable way of managing the farm as he did; and that cows were the most profitable stock he could keep:—Held, that A. was not a cow-keeper within the bankrupt act, 12 & 13 Vict. c. 106, s. 65.

THE following case was stated for the opinion of the court by an arbitrator, pursuant to the powers conferred by an order of nisi prius dated the 30th of June, 1854:—

"To all to whom these presents shall come, I, H. M., Esq., barrister-at-law, send greeting: Whereas, I have undertaken the burden of the reference made to me by an order made at the sittings at nisi prius held at the Guildhall of the city of London on the 30th day of June last, before The Rt. Hon. the Lord Chief Justice of Her Majesty's court of Common Pleas at Westminster, in a certain action wherein William Bell and David Basset, as assignees of Henry Miles Haviland, a bankrupt, were plaintiffs, and Robert Young was defendant; and by which order I was required to state any point of law for the opinion of the said court, if required by either party. Now, know ye, that I, the said H. M., having been attended by counsel for the said parties respectively, and having heard and considered all the evidence and allegations of the said parties respectively, do make this my award in writing of and concerning all the matters referred to me, that is to say, I direct the verdict entered for the plaintiffs on all the issues joined between the parties in the said action to be set aside, and in lieu thereof I award, order, and direct a verdict to be entered for the plaintiffs upon the issues joined upon the defendant's first, second, and third pleas, and for the defendant

upon the issue joined upon the defendant's fourth plea, subject, nevertheless, as regards the verdict upon the last-mentioned issue, to the opinion of the court of Common Pleas upon the following point of law, which the plaintiffs have required me to state, that is to say,—whether or not in point of law, upon the facts proved before me, the said Henry Miles Haviland was, and must be deemed and taken to have been, a trader liable to become bankrupt.

“The facts proved before me were as follows:—On the 26th of March, 1850, the said Henry Miles Haviland took a lease from Benjamin Way, Esq., of all those two messuages or tenements, gardens, barns, and stables, coach and cart-houses, outbuildings, pieces, or parcels of arable and meadow land, called Ivy House Farm and Red Hill Farm, situate in the parish of Denham, in the county of Buckingham, containing altogether, by estimation, 271*a.* 1*r.* 18*p.*, that is to say, 207*a.* 0*r.* 4*p.* of arable land, and 64*a.* 1*r.* 14*p.* of meadow land, to hold for seven years from the 29th of September, 1850, at the yearly rent of 500*l.*, payable quarterly: and by the said lease, Haviland covenanted with Way that he would during the said term cultivate and manage the whole of the arable and meadow land in a good and husbandlike manner, and keep the same in good heart, plight, and condition; and also that he would not mow any of the meadow land more than once in the same year; and that he would not break up any of the meadow land under any pretence whatever, without the consent in writing of the said Benjamin Way, under a penalty of 50*l.* an acre, to be recovered as liquidated damages; *that he would stack the whole of the produce upon the demised land, and consume the whole of the turnips and other roots upon the premises.*

“Between Michaelmas, 1850, and October, 1853, part of the stock kept by Haviland upon the said farm

1855.

 BELL
v.
YOUNG.

1855.

BELL
v.
YOUNG.

consisted of cows. The greatest number of cows so kept by him at any one time, was six, of which not more than four at any one time yielded milk. During the greater part of the time, Haviland kept only three, and sometimes he kept only two cows. The farms were about a mile distant from the town of Uxbridge. It was Haviland's intention in keeping the cows, and it was his practice to sell a considerable quantity of the milk obtained from them. If he had not done so, he would have sustained a loss by keeping so many cows upon the farms. He sent a man into Uxbridge daily to sell and deliver some of the milk. Some was sold upon the farm, and some was consumed by Haviland and his family. Some of the purchasers, both in Uxbridge and at the farm-house, were regular customers, and took by arrangement a certain quantity of milk daily. Others were chance customers. When the cows yielded more milk than Haviland could sell and dispose of in the way I have mentioned (as was sometimes the case), then butter was made out of the surplus; and some of the butter so made was sold at Uxbridge by a grocer employed by Haviland for that purpose. The milk out of which the butter was taken, was used for feeding calves and pigs upon the farm.

"It was a good, proper, and husbandlike, as well as a profitable way of using and managing the said farms, to keep cows and sell milk and butter, as Haviland did. It would not have been bad farming (as between landlord and tenant), if Haviland had not kept any cows; but cows, to the extent to which Haviland kept them, were the most profitable stock he could keep upon his farms.

"If, upon these facts, the court shall be of opinion, that, in point of law, Haviland was, and that he must be deemed and taken to have been, a trader liable to become bankrupt, then I direct the verdict upon the

fourth issue (as well as upon the other three issues) to be entered for the plaintiffs, with damages 1189*l.* 1*s.* 2*d.* But, if the court shall not be of that opinion, then the verdict upon the fourth issue is to stand and remain entered absolutely for the defendant, and the verdict upon the other three issues is to stand and remain entered for the plaintiffs, without any damages.

1855.

 BELL
v.
YOUNG.

"In the event of the verdict upon the fourth issue (that is to say, the issue joined upon the defendant's fourth plea) remaining entered for the defendant, then I award and order that the plaintiffs shall bear their own costs of the reference and award, and that they shall pay to the defendant his costs thereof. But, if the court shall be of opinion, that, in point of law, upon the facts which I have stated, Haviland was, and that he must be deemed and taken to have been, a trader liable to be made a bankrupt,—in which event the verdict upon the fourth issue is not to remain entered for the defendant, but is to be entered for the plaintiffs, then I award and order that the defendant shall bear his own costs of the reference and award, and that he shall pay to the plaintiffs their costs thereof. In witness, &c., this 31st of October, 1854."

T. Jones, for the plaintiffs. The question is, whether or not Haviland was, upon the facts found by the arbitrator, a "cow-keeper" within the meaning of the 12 & 13 Vict. c. 106, s. 65. [*Maule*, J. There is no statement in the case that he ever *bought* any cows.] It states that the number kept by him varied. [*Jervis*, C. J. To hold this man a cow-keeper would be making every farmer in England liable to the bankrupt laws.] The facts stated shew something more than a mere keeping of cows as incidental to the profitable occupation of the farms. Prior to the 5 & 6 Vict. c. 122, such transactions as these would not have rendered a man

1855.

 BELL
 v.
 YOUNG.

liable to the bankrupt laws: *Carter v. Dean*, 1 Swanst. 64. [*Jervis*, C. J. The case finds that Haviland kept no more cows than the due cultivation of his farms justified his keeping. In *Ex parte Dering*, *In re Cramp*, 1 De Gex's B. C. 398, a farmer in the Isle of Thanet, occupying two farms containing together two hundred acres, kept five cows, four of which were Alderneys, and seven horses, and no other stock: and it was held, that his selling the milk of the cows regularly to a retail dealer in Margate, who paid for it on an average 30s. a week, did not render him subject to the bankrupt laws as a cow-keeper. The Chief Judge (Sir J. L. Knight Bruce) there says: "Although the act (5 & 6 Vict. c. 122) specifies cow-keepers as persons liable to the bankrupt laws, it does not of course mean to include all persons who keep cows. The bankrupt here was a farmer, and kept cows, but was not, I think, a cow-keeper within the meaning of the act." I think you had better dispose of that case before you proceed to cite others.] The case finds that Haviland had a substantive intention to be a milkman: he had a milk-walk; he kept cows for the sake of the profit to be derived from the sale of their milk. In *Wells v. Parker*, 1 T. R. 34, it was held that a person who rents a brick-ground, and makes bricks thereon for public sale, is subject to the bankrupt laws: and Lord Mansfield, in delivering judgment, said: "From the authorities that have been cited, and the reason of the thing, I take the true distinction to be this: if a man exercise a manufacture from the produce of his own land, as a *necessary or usual mode of reaping or enjoying that produce*, and bringing it advantageously to market, he shall *not be considered as a trader*, though he buy the necessary ingredients and materials to fit it for market; as in the case of a farmer who makes cheese on his own land, and who buys runnet and salt; or, as in a case mentioned at the bar,

where a man makes his own apples into cyder, though there be an expense attending the operation, and though many things are to be bought, and some mixture, yet he is no trader; for, it is the usual mode of enjoying land in the cyder counties. So, in the alum-works, as determined, where the operation was proved to be the necessary and constant mode practised by the proprietors of alum-works. Or like the case of coal-mines, where raising them out of the pit is as necessary to the enjoyment of the land, as threshing corn, &c. But, where the *produce of the land is merely the raw material of a manufacture*, and used as such, and *not according to the usual mode of enjoying the land*; in short, *where the produce of the land is an insignificant article* in comparison of the whole expense of the manufacture, there *he ought to be considered as a trader.*" If this man is not a trader, it is difficult to see how any cow-keeper can be a trader: the case discloses every element of trading. *Bartholomew v. Sherwood*, cited in *Patman v. Vaughan*, 1 T. R. 573, is well deserving of attention. It appeared in evidence, that Davies, the bankrupt, had rented a considerable farm at Whitchurch, and that he kept two, and occasionally three teams of horses for the farming business; that previously to his taking the farm, he had lived with an uncle, during which time he attended several different fairs, and occasionally bought and sold horses: that, after he took the farm at Whitchurch, there were several instances of his attending fairs, and every now and then buying a horse which was not calculated for the farming business, and which he constantly sold again; and that, during the course of two years, he had bought and sold five or six horses in this manner, two of which had been sold directly after he had bought them, for the sake of a guinea profit, and another was sold again within three days. No evidence being offered to contradict this on the part of the defendant, the judge left it to the jury on the plaintiff's evidence;

1855.

 BELL
v.
YOUNG.

1855.

BELL
v.
YOUNG.

and they found a verdict for the plaintiff. Upon a motion for a new trial, Ashhurst, J., said,—“It is admitted, on the part of the defendant, that this was a matter of evidence, and proper for the consideration of the jury. Then, if it were proper to be left to them, and there was no evidence to contradict it, they were bound to find as they did. The general principle is right, that a farmer, as such, is not an object of the bankrupt laws: and, if a farmer in the course of his business buy a horse, and, after using him some time, sell him again, that will not subject him to the bankrupt laws. But, in this case, the evidence is, that he bought horses *for the express purpose of gaining by it.*” And Buller, J., said: “It appears upon the evidence that there were many instances of the bankrupt’s buying horses which he could not use in his farming business, and others which he bought for the express purpose of selling again. Whether there were more or fewer instances, was proper to be left to the consideration of the jury. It is like the case of a vintner, who, if he sell only a few dozen of liquor to particular friends, cannot be made a bankrupt, but, if he be desirous to sell to every person who applies, that will subject him to the bankrupt laws. But, in all these cases, the question is, whether the person buy and sell with a view to make a profit by it; and that is proper to be left for the consideration of the jury.” [Maule, J. The horses there had nothing to do with the cultivation of the farm. Here, it is found that there was no profit derived by Haviland from the sale of the milk, except as ancillary to the management of his farms. The main object of keeping stock, is, to manure the land. Do you say that *Ex parte Dering* is not in point?] It is distinguishable in many of its circumstances. There is no covenant here, as there was in that case, to fodder the straw and green crops upon the farms; and the point now made was not urged there.

Honyman, for the defendant, was not called upon.

1855.

BELL
v.
YOUNG.

JERVIS, C. J. Though in one sense Haviland, under the facts found here, was a cow-keeper, inasmuch as he kept cows, he clearly was not a cow-keeper within the meaning of the bankrupt laws. He is a farmer. He finds it a convenient and profitable mode of cultivating his farm, to keep cows for the purpose of consuming the produce on the land; and, the cows yielding more milk than could be consumed upon the premises, he sells the surplus. I think the case is governed by *Ex parte Dering*. The act was intended to apply to persons who keep cows for the purpose of carrying on the trade of dealers in milk, and not to farmers who merely keep a few cows for the purposes of their farms.

MAULE, J. I cannot distinguish the present case from *Ex parte Dering*.

CRESSWELL, J. I also am satisfied that the decision of this case rests upon the same ground as that of *Ex parte Dering*.

WILLIAMS, J. I am of the same opinion. *Ex parte Hammond*, 1 De Gex's B. C. 93, is a case also in principle like this. There, a tenant of one hundred and thirty acres, under a farming lease which obliged him to fallow or plant with peas or potatoes (among other things) every third year, had on his farm twelve acres of young potatoes and twenty acres of green peas growing in open fields every year, and consigned the produce for table consumption to London salesmen, to whom he allowed such commission as was usually allowed by market-gardeners: and it was held that he was not a market-gardener within the 5 & 6 Vict. c. 122, s. 10.

Judgment for the defendant.

1855.

Jan. 27.

COTTRELL v. HUGHES.

In the years 1762 and 1763, two several terms of 1000 years each were created, for mortgage purposes; and, the mortgage debts having been satisfied, these two terms were in 1773 assigned to one Hill, in trust to attend the inheritance, for the benefit of J. C., the elder (the great-grandfather of the plaintiff), who was then seised in fee. In 1778, the estate was limited in strict settlement, on the marriage of J. C. the younger (the plaintiff's

grandfather); and, in 1813, by a settlement made by the plaintiff's father and grandfather, the estate was limited to the plaintiff's father for life, with remainder to such of his children as he should appoint: but in neither of these settlements was any notice taken of the outstanding terms. In 1840, the plaintiff's father,—assuming and covenanting that he was seised in fee,—sold the estate to one M. D., with whom the defendant was assumed to be identical; and on that occasion the two satisfied terms of 1000 years each were assigned, by the executors of Hill, to a trustee for M. D. to attend and protect the inheritance. M. D. had no notice, at the time of the purchase, of the settlement of 1813. In 1844, the plaintiff's father duly executed the power conferred on him by the settlement of 1813, and thereby limited the estate, after his death (which took place in 1853), to his eldest son, the plaintiff, in fee.

In ejectment brought by the plaintiff to recover the premises:—

Held, that the mere circumstance of the omission of all mention of the two terms for 1000 years in the conveyances of the estate subsequent to 1813, would not justify the court (even if, on the authority of *Doe v. Hilder*, 2 B. & Ald. 782, it would have warranted a jury) in presuming their surrender; and that, inasmuch as a court of equity would not have restrained the setting up of those terms by M. D. in a court of law, they must be considered as still subsisting, notwithstanding the statute 8 & 9 Vict. c. 112; and consequently the plaintiff was not entitled to recover, because those terms preceded the estate acquired by him under the settlement of 1813, and therefore the title to the legal possession for the remainder of the terms was not in him, but in the assignee thereof.

THIS was an action of ejectment to recover a messuage or dwelling-house situate in the parish of Wolverhampton, in the county of Stafford, called the Wood End or Wood Hayes, and five pieces of land adjoining the same, and also two pieces of land called Wednesfield, situate in the same parish. The defendant appeared and defended for the whole.

The cause came on to be tried before Wightman, J., at the last Spring Assizes for the county of Stafford, when a verdict was by consent found for the plaintiff, subject to the opinion of the court upon the following case:—

The plaintiff, Thomas Swinfen Cottrell, is the eldest son of Thomas Swinfen Cottrell the elder, deceased, and Elizabeth his wife, also deceased, and claims to be entitled in fee-simple to the premises in question under and by virtue of the indenture of the 4th of May, 1813, and the deed of appointment of the 10th of October, 1844, hereinafter respectively mentioned.

By indentures of lease, release, and assignment, dated respectively the 21st and 22nd of April, 1773, and made between the Rev. John Lea, clerk, Thomas Lea, Samuel Haley and Sarah his wife, and Mary Lea, of the first part, John Davies of the second part, William Egington and his wife of the third part, Joseph Cottrell of the fourth part, and William Hill of the fifth part,—and which indentures were duly executed by all the aforesaid parties,—after reciting, that, by an indenture of lease dated the 12th of June, 1762, made between the said William Egington of the one part, and Ruth Butler of the other part, the said William Egington demised by way of mortgage, for the term of one thousand years, unto the said Ruth Butler, her executors, administrators, and assigns, two undivided third parts or shares of certain premises, including those which are the subject of this action, to secure the repayment of 30*l.* and interest on the 12th of December then next ensuing; and that, by an indenture of assignment and demise dated the 29th of June, 1763, made between the executrixes of the said Ruth Butler, then deceased, of the first part, the said W. Egington of the second part, and Jane Shenton of the third part, the said executrixes, in consideration of the re-payment to them by the said Jane Shenton of the said mortgage money and some interest thereon, assigned to the said Jane Shenton, her executors, administrators, and assigns, the premises comprised in the said lease to the said Ruth Butler for the residue of the said term of one thousand years; and the said W. Egington, in consideration of a further advance to him, also demised by way of mortgage unto the said Jane Shenton, her executors, administrators, and assigns, the other third part or share in the said premises for the term of one thousand years from the date thereof;—and further reciting a subsequent assignment by the said Jane Shenton (confirmed by the said W. Egington and

1855.

 COTTRELL
 v.
 HUGHES.

 Indentures of
 21 & 22 April,
 1773.

 Recital of
 deeds creating
 the terms.

1855.
 COTTRELL
 v.
 HUGHES.

Elizabeth his wife), for the consideration therein mentioned, of the whole of the said premises to Stephen Falkner, for the remainder of the two several terms of one thousand years, and one thousand years, to secure the re-payment to the said Stephen Falkner of 160*l.* and interest, as therein mentioned; and that, by an indenture of the 12th of June, 1770, made between the said Stephen Falkner of the first part, the said W. Egington and Elizabeth his wife of the second part, and the Rev. Samuel Lea of the third part, in consideration of the payment by the said Samuel Lea to the said Stephen Falkner of the mortgage money and interest due to the latter, and of a further advance made by the said Samuel Lea to the said W. Egington and Elizabeth his wife, demised, ratified, and confirmed unto the said Samuel Lea, his executors, administrators, and assigns, the whole of the said premises, by way of mortgage, for the residue of the above mentioned terms respectively;—and also reciting the death of the said Samuel Lea, having made his will, and appointed executors, who had duly proved the same;—the premises which are the subject of this action, were, together with others, for the consideration therein mentioned, conveyed to the said Joseph Cottrell in fee-simple; and the two several terms of one thousand years respectively were assigned by the executors of the said Samuel Lea (the principal money and interest due to them being discharged by the said Joseph Cottrell) to William Hill, his executors, administrators, and assigns, for all the residue thereof, in trust to attend the inheritance for the benefit of the said Joseph Cottrell, his heirs and assigns.

Indentures of
 27 and 28 Sept.
 1778.

By indentures of lease and release, dated respectively the 27th and 28th of September, 1778,—the release made between the said Joseph Cottrell, therein called the elder, and Joseph Cottrell the younger, eldest son of

the said Joseph Cottrell the elder, of the first part, Thomas Swinfen and Alice Grundy of the second part, Samuel Perkes and Joseph Palmer of the third part, and Samuel Grundy and John Corser of the fourth part,—being a settlement made in contemplation of the marriage of the said Joseph Cottrell the younger and the said Ann Grundy,—the premises which are the subject of this action were, for the consideration therein mentioned, conveyed by the said Joseph Cottrell the elder, to the said Samuel Perkes and Joseph Palmer, To the use (after the solemnization of the said then intended marriage) of the said Joseph Cottrell the elder and his assigns for life, with remainder to the use of the said Joseph Cottrell the younger and his assigns for life, with remainder to the use of the said Samuel Perkes and Joseph Palmer, and their heirs, during the life of the said Joseph Cottrell the younger, upon trust to support contingent remainders, with remainder to the use of the said Ann Grundy, for life, with remainder to the use of the said Samuel Perkes and Joseph Palmer, and their heirs, during the life of the said Ann Grundy, in trust to support contingent remainders, with remainder to the use of the first son of the body of the said Joseph Cottrell the younger on the body of the said Ann Grundy lawfully to be begotten, and the heirs of the body of such first son lawfully issuing, with divers remainders over, and ultimately to the use of the right heirs of the said Joseph Cottrell the younger.

The said marriage between the said Joseph Cottrell the younger and the said Ann Grundy was duly had and solemnized shortly after the date and execution of the above-recited indenture.

The said Thomas Swinfen Cottrell the elder, the father of the plaintiff in this suit, was the eldest son of the said marriage, and had, at the time of the making of the indenture next hereinafter mentioned, attained the age of twenty-one years.

1855.

COTTRELL
v.
HUGHES.

1854.

COTTRELL

v.

HUGHES.

The said Joseph Cottrell the elder died in or about January, 1791. On the 4th of August, 1810, the said Thomas Swinfen Cottrell the elder intermarried with Elizabeth Bateman, who was living at the date of the indenture next hereinafter mentioned; and the plaintiff was the eldest son of such marriage.

Indentures of
3 and 4 May,
1813.

By indentures of lease and release, dated respectively the 3rd and 4th of May, 1813,—the release made between the said Joseph Cottrell the younger and Anne his wife of the first part, the said Thomas Swinfen Cottrell the elder of the second part, Benjamin Whittaker of the third part, William Garfield of the fourth part, James Hordern and Samuel Cottrell of the fifth part, and William Buckley and Joseph Grundy of the sixth part,—reciting the before-mentioned indentures of lease and release of the 27th and 28th of September, 1778, and that the said Thomas Swinfen Cottrell the elder had attained the age of twenty-one years; and further reciting that the said Joseph Cottrell the younger and Anne his wife and Thomas Swinfen Cottrell the elder had agreed to suffer a common recovery of the hereditaments comprised in the said indenture of the 28th of September, 1778, and had also agreed that the same recovery, when suffered, should enure to the use, upon the trusts, and for the ends, intents, and purposes thereafter expressed and declared,—It was witnessed, that, in pursuance of the said agreement, and for the barring and extinguishing of all estates-tail, and remainders and reversions thereupon expectant or depending, of and in the messuages, tenements, or dwelling-houses, closes, pieces, or parcels of land, and hereditaments thereafter mentioned, and intended to be thereby released, with the appurtenances, and for the limiting and assuring of the same hereditaments to the uses, upon the trusts, and for the ends, intents, and purposes thereafter expressed and declared, and for and in consideration of the sum of 10*s.* by the said Benjamin Whittaker to the said

Joseph Cottrell and Ann his wife and Thomas Swinfen Cottrell, they, the said Joseph Cottrell the younger and Ann his wife and Thomas Swinfen Cottrell the elder, and each and every of them, granted, bargained, sold, aliened, released, and confirmed unto the said Benjamin Whittaker, in his actual possession, &c., and to his heirs and assigns, the premises in question, unto and to the use of the said Benjamin Whittaker and his heirs, to the intent that he might become perfect tenant of the freehold, against whom a good and perfect common recovery with double voucher might be had and suffered thereof according to the usual course of common recoveries for assurance of lands: and by the said indenture it was covenanted, declared, and agreed that the said common recovery, when suffered, should enure, as to the said premises, to the use of such person and persons, and for such estate or estates, as the said Joseph Cottrell the younger and Ann his wife and the said Thomas Swinfen Cottrell the elder, during their joint lives, by any deed or deeds, instrument or instruments in writing, should from time to time jointly direct, limit, or appoint, and, for want of such joint direction, limitation, or appointment, to the use of the said Joseph Cottrell the younger and his assigns for and during the term of his natural life, with remainder to the use of the said Ann Cottrell, the wife of the said Joseph Cottrell the younger, for her life, in bar of dower, with remainder to the use of the said Thomas Swinfen Cottrell the elder, and his assigns, for his life; and, immediately after the decease of the survivor of them the said Joseph Cottrell the younger and Ann his wife and Thomas Swinfen Cottrell the elder, to the use of all and every or such one or more of the children of the said Thomas Swinfen Cottrell the elder, and for such estate and estates, as the said Thomas Swinfen Cottrell the elder by any deed or deeds to be sealed and delivered by him in the presence of, and to

1855.

 COTTRELL
 v.
 HUGHES.

1855.

 COTTRELL
 v.
 HUGHES.

be attested by, two or more credible witnesses, or by his last will and testament, should from time to time direct, limit, or appoint; and, in default of such appointment, to the use of all and every the child and children of the said Thomas Swinfen Cottrell the elder, as tenants in common, and the heirs of their bodies, with cross-remainders between the said children, and with remainder to the right heirs of the said Thomas Swinfen Cottrell the elder.

In pursuance of the provisions contained in the said indenture of the 4th of May, 1813, a common recovery of the said premises was duly suffered in Easter Term, 53 G. 3,—1813.

The said Joseph Cottrell the younger and Ann his wife died, the former in June, 1833, and the latter in September, 1827, without having joined the said Thomas Swinfen Cottrell the elder in executing the joint power of appointment contained in the said indenture of the 4th of May, 1813.

Mortgage,
 March 24,
 1836.

By an indenture of mortgage, dated the 24th of March, 1836, the said Thomas Swinfen Cottrell the elder, in consideration of 200*l.* lent to him by Sarah Saunders and Edward Hall, demised the premises in question to the last-mentioned parties for the term of one thousand years, which deed contained a covenant from him that he was seised in fee-simple of the premises, and had good right to convey, with the usual covenant for quiet enjoyment after default in payment of the mortgage money. This deed was not inrolled in Chancery.

Mortgage,
 Jan. 19, 1837.

By an indenture of the 19th of January, 1837, in consideration of the payment by William Steel of such mortgage money to the said Sarah Saunders and Edward Hall, and of the further advance of 300*l.* to the said Thomas Swinfen Cottrell the elder, the premises were assigned by the said Sarah Saunders and Edward Hall, and granted, ratified, and confirmed by the said Thomas

Swinfen Cottrell the elder to the said William Steel, for the residue of the said last-mentioned term. This deed was inrolled in Chancery on the 21st of January, 1837, pursuant to the 3 & 4 W. 4, c. 74, for the abolition of fines and recoveries; and an indorsement of such inrolment was duly made thereon.

1855.

 COTTRELL
 v.
 HUGHES.

By indentures of lease and release dated the 27th and 28th of July, 1838, made between the said Thomas Swinfen Cottrell the elder and Elizabeth his wife of the first part, the said William Steel of the second part, the Rev. John Clare of the third part, and Henry Littlewood of the fourth part, being an indenture of mortgage and assignment,—after reciting the said indenture of the 28th of September, 1778, and the marriage of the said Joseph Cottrell the younger and Ann Grundy, and the deaths of Joseph Cottrell the elder, Joseph Cottrell the younger and Ann his wife, and that the said Thomas Swinfen Cottrell the elder was the first son of the said Joseph Cottrell the younger and Ann his wife,—in consideration of 500*l.* paid by the said John Clare to the said William Steel, and of the further sum of 500*l.* paid by him to the said Thomas Swinfen Cottrell the elder, the said Thomas Swinfen Cottrell the elder did grant, bargain, sell, and release, and the said Elizabeth his wife did release, quit claim, and dispose of unto the said John Clare and his heirs, all the aforesaid premises, to hold the same unto the said John Clare and his heirs and assigns, freed and absolutely discharged from the said estate-tail, and all other estates-tail, remainders, limitations over, reversions, estates, rights, interests, and powers to take effect after or in defeasance of such estate-tail, and also discharged from the title to dower of the said Elizabeth Cottrell, to the use of the said John Clare, his heirs and assigns, subject to redemption on payment of the mortgage money and interest.

Indentures of
 lease and re-
 lease, 27 and
 28 July, 1838.

The said last-mentioned indenture contained a power

1855.

COTTRELL
v.
HUGHES.

of sale on default in payment of the mortgage money, and covenants by the said Thomas Swinfen Cottrell the elder for the acknowledgment of the same by the said Elizabeth his wife; that the said Thomas Swinfen Cottrell the elder had good right to convey, for quiet enjoyment after default; and for further assurance. And by the same indenture the said William Steel assigned the said premises to the said Henry Littlewood for the remainder of the last-mentioned term of one thousand years, in trust for the said John Clare, and to attend the inheritance.

The last-mentioned deed was duly acknowledged by the said Elizabeth Cottrell before two commissioners duly authorised to take acknowledgments from married women in the county of Stafford, and was also duly inrolled in Chancery in 1838, in pursuance of the statute for the abolition of fines and recoveries.

Before the making of the indenture hereinafter next mentioned, the said John Clare, the mortgagee, died, leaving the Rev. George Boodle Clare, his eldest son and heir-at-law.

Indentures of
lease and re-
lease, 22 and
23 Dec. 1839.

By indentures of lease and release, dated the 22nd and 23rd of December, 1839, made between the said Thomas Swinfen Cottrell the elder and Elizabeth his wife of the first part, the said Rev. George Boodle Clare of the second part, Charlotte Clare, administratrix with the will annexed of the said John Clare, deceased, of the third part, the said Henry Littlewood of the fourth part, and Mark Devey of the fifth part, in consideration of the payment by the said Mark Devey of 1000*l.* to the said Charlotte Clare, as such administratrix as aforesaid, being the mortgage money under the indenture of the 28th of July, 1838, and the further sum of 300*l.* also paid by him to the said Thomas Swinfen Cottrell the elder, the said George Boodle Clare, for the nominal consideration therein mentioned, released and conveyed,

and the said Thomas Swinfen Cottrell the elder and Elizabeth his wife granted, bargained, sold, released, and confirmed, the premises in question unto the use of the said Mark Devey in fee, subject to redemption on repayment of 1300*l.* and interest on a day therein mentioned.

This indenture contained covenants from the said Thomas Swinfen Cottrell, the elder, that he had good right to convey, for quiet enjoyment, and for further assurance, and a covenant from the said Henry Littlewood to stand possessed of the residue of the term of one thousand years assigned to him by the indenture of the 28th of July, 1838, in trust for the said Mark Devey.

The last-mentioned deed was duly acknowledged by the said Elizabeth Cottrell before commissioners of the city of Stafford duly authorised to take acknowledgments of deeds from married women; and an indorsement of such acknowledgment was duly made thereon, but the said deed was not executed by the said Henry Littlewood.

On the 26th and 27th of October, 1840, indentures of lease and release were made between the said Thomas Swinfen Cottrell the elder of the first part, the said Mark Devey of the second part, John Edward Bealey of the third part, Thomas Farmer and William Stocks of the fourth part, and William Harrison of the fifth part. The lease recited the before-mentioned indentures of the 21st and 22nd of April, 1773, and of the 27th and 28th of September, 1778, the death of Joseph Cottrell the elder, the marriage of Joseph Cottrell the younger and Ann Grundy, and their deaths, and that the said Thomas Swinfen Cottrell the elder was their first son, and that he was the heir-at-law of the said Joseph Cottrell the younger; and also recited the several indentures of mortgage hereinbefore mentioned and referred to, and that Mark Devey had contracted with the said Thomas Swinfen Cottrell the elder for the absolute purchase of

1855.

 COTTRELL
 v.
 HUGHES.

Indentures of
 lease and re-
 lease, 26 and
 27 Oct. 1840.

1855.

COTTRELL
v.
HUGHES.

the premises in question, free from incumbrances, for the sum of 2000*l.*, of which the said mortgage debt of 1300*l.* then due to the said Mark Devey was to be part. It further recited the death of the said William Hill, to whom the two mortgage terms of one thousand years respectively mentioned in the indenture of the 22nd of April, 1773, had been assigned by that indenture to attend the inheritance; the appointment by him of executors to his will; and the further appointment by his surviving executor of the said Thomas Farmer and Samuel Stocks (parties thereto) as his executors. And by the said indentures of the 26th and 27th of October, 1840, the said premises, the subject of this action, were then, in consideration of the sum of 1300*l.* then due to the said Mark Devey as the said mortgage debt, and of the further sum of 700*l.* paid by him to the said Thomas Swinfen Cottrell the elder, making together 2000*l.*, granted, bargained, sold, aliened, released, and appointed by the said Thomas Swinden Cottrell the elder to the said Mark Devey in fee: and by the same indenture the said Thomas Farmer and Samuel Stocks, as such executors as aforesaid, by the direction of the said Thomas Swinfen Cottrell the elder, assigned the said premises to William Harrison for the residue of the several terms of one thousand years and one thousand years respectively mentioned in the said indenture of the 22nd of April, 1773, in trust for the said Mark Devey, his heirs and assigns, and to be assigned or disposed of as he or they should direct or appoint, and in the meantime to attend the inheritance, to protect the same from all mesne incumbrances.

This deed also contained covenants by the said Thomas Swinfen Cottrell the elder, that he had good right to convey, for quiet enjoyment, free from incumbrances, and for further assurance.

At the time of the making of the last-mentioned in-

denture, the said Thomas Farmer and Samuel Stocks were the legal personal representatives of the said William Hill mentioned in the indenture of the 22nd of April, 1773.

1855.

 COTTRELL
v.
HUGHES.

By an indenture of the 27th of October, 1840, made between the said Henry Littlewood of the first part, the said Thomas Swinfen Cottrell the elder of the second part, the said Mark Devey of the third part, and Joseph Bealey Stanley of the fourth part, the said Henry Littlewood assigned to the said Joseph Bealey Stanley the said term of one thousand years mentioned in the deed of the 28th of July, 1838, in trust for the said Mark Devey, and to attend the inheritance.

Assignment of
the terms to
Devey.

None of the before-mentioned deeds since the year 1813 made any mention of the said indentures of lease and release of the 3rd and 4th of May, 1813; nor had the said Mark Devey, or any of the parties claiming under any such deeds, any notice thereof.

On the 10th of October, 1844, the said Thomas Swinfen Cottrell the elder executed a deed of appointment, of the same date, made between the said Thomas Swinfen Cottrell the elder of the one part, and Thomas Swinfen Cottrell the younger (the present plaintiff) of the other part,—by which, after reciting the indenture of the 4th of May, 1813, it was witnessed, that, by virtue and in execution of the power and authority to him thereby reserved, the said Thomas Swinfen Cottrell the elder limited and appointed the said premises (after his decease) to the use of the plaintiff in fee.

Appointment,
Oct. 10, 1844.

This deed was executed by the said Thomas Swinfen Cottrell the elder in the presence of, and was duly attested by, two credible witnesses, as required by the power in that behalf contained in the indenture of the 4th of May, 1813.

Thomas Swinfen Cottrell the elder died on the 25th of August, 1853.

Death of T. S.
Cottrell the
elder.

1855.

COTTRELL
v.
HUGHES.

Soon after the execution of the said deed of appointment of the 10th of October, 1844, the plaintiff was for the first time informed that the said Mark Devey claimed as purchaser to be entitled to an estate in fee-simple in the premises in question; and, thereupon, in October, 1844, the plaintiff caused a notice in writing to be given to the said Mark Devey, of the said indenture of the 4th of May, 1813, and of the uses to which the premises in question were limited by the said indenture; and that, under and by virtue of the limitations in the said indenture, the plaintiff claimed to be entitled to an estate in fee-simple in the premises in question. This was the first notice that the said Mark Devey had received of the said indenture of the 4th of May, 1813.

In the same year 1844, and after the service of the said notice on the said Mark Devey, the solicitor of the said Mark Devey applied for and obtained an inspection and abstract of the said indenture.

In the year 1845, the said Mark Devey died, having in the month of December, 1844, made his will, duly executed to pass real estate, whereby he devised the said premises to John Bealey for his life, with remainders over.

The said John Bealey is still living; and the said Mark Devey and the said John Bealey have successively been in the receipt of the rents of the premises in question from the execution of the indentures of the 26th and 27th of October, 1840: and the defendant, Richard Hughes, was at the commencement of this action, and still is, in the occupation thereof as tenant of the said John Bealey.

In the year 1845, the plaintiff served upon the said John Bealey and the said Richard Hughes a similar notice to the one he had previously served upon the said Mark Devey.

The question for the opinion of the court was,—

whether the plaintiff was entitled to recover in this action. If the court should be of that opinion, the verdict for the plaintiff was to stand; but, if the court should be of a contrary opinion, the verdict was to be entered for the defendant.

1855.

COTTRELL
v.
HUGHES.

Whateley (with whom was *Scotland*) for the plaintiff. (a) The question is, whether the two terms

(a) The points marked for argument on the part of the plaintiff, were as follows:—

“That the plaintiff is entitled to an estate in fee in the messuage and lands which are the subject of the action:

“That Thomas Swinfen Cottrell the elder (deceased), the father of the plaintiff, took an estate-tail in the said messuage and lands under the indentures of lease and release of the 27th and 28th of September, 1778; and that the indentures of lease and release of the 3rd and 4th of May, 1813, and the common recovery of Easter Term, 53 G. 3, were good and effectual to bar the said estate-tail, and limit the said messuage and lands to the new uses declared in and by the said indenture of the 4th of May, 1813:

“That, from and after the said common recovery had been suffered, and until his death, the said Thomas Swinfen Cottrell the elder was seized only of an estate for life, with a power of appointment in favour of all or some or one of his children; and that, by the deed of appointment of the 10th of October,

1844, being a valid execution of the said power, the plaintiff became, and is now, entitled to an estate in fee in possession in the said messuage and lands:

“That the indentures of lease and release of the 22nd and 23rd of December, 1839, and of the 26th and 27th of October, 1840, were invalid and ineffectual conveyances by the said Thomas Swinfen Cottrell the elder of any greater estate than at most an estate for his life:

“That the defendant's title to any greater estate than for the life of the said Thomas Swinfen Cottrell the elder, must be made through the said Thomas Swinfen Cottrell the elder as tenant-in-tail under the indentures of lease and release of the 27th and 28th of September, 1778, and is therefore barred by the said common recovery:

“That the several terms of one thousand years and one thousand years mentioned in the indentures of lease and release of the 26th and 27th of October, 1840, are the only valid and existing outstanding

1855.

 COTTRELL
 v.
 HUGHES.

of one thousand years respectively created by the indentures of the 12th of June, 1762, and 29th of June, 1763, are to be considered as still subsisting. [Williams, J. If the statute 8 & 9 Vict. c. 112 had never been passed, the outstanding terms would have been in Harrison by virtue of the indentures of the 26th and 27th of October, 1840.] Certainly. But the question is, whether there is not evidence from which the court may presume those terms to have been surrendered prior to the execution of those indentures, in the absence of all mention of them in the intermediate deeds. [Williams, J. Can we presume a surrender without the intervention of a jury?] In *Doe d. Putland v. Hilder*, 2 B. & Ald. 782, a surrender was presumed. A term was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance: in 1814, the owner of the inheritance executed a marriage settlement; and, in 1816, he conveyed his life-interest in the estate to a purchaser, as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion: in 1819, an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser in 1816: and the court of King's Bench held, that, under these circumstances, on an ejectment brought by

terms (if any), and, being created and assigned to attend the inheritance long antecedent to the indentures of lease and release of the 27th and 28th of September, 1778, they enure to support and protect the estates limited by and under the indenture of the 4th of May, 1813, and cannot be set up by the defendant under the indentures of the 26th and 27th of October, 1840, to de-

feat the estate of the plaintiff:

"That the said common recovery had the effect of barring and putting an end to the said last-mentioned terms of years:

"That the term of one thousand years mentioned in the deed of the 28th of July, 1838, and of the 27th of October, 1840, has no legal and valid existence so as to defeat the plaintiff's title."

a prior incumbrancer against the purchaser, the jury were warranted in presuming that the term had, previously to 1819, been surrendered. [*Cresswell*, J. There the matter went to a jury : and the case has certainly not been much approved of.] Abbott, C. J., in giving judgment, says : " Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion thus become the cestui que trust of the term, may be accounted for by the union of the two characters of cestui qui trust and inheritor, and without supposing any surrender of the term ; and therefore, in general, such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But, where acts are done or omitted by the owner of the inheritance, and persons dealing with him, as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of a trustee, and if there do not appear to be anything that should prevent a surrender from having been made ; in such cases, the things done or omitted may most reasonably be accounted for by supposing a surrender of the term ; and therefore a surrender may be presumed." [*Williams*, J. I have always understood it to be a question for the jury, and not for the court.] A surrender was not presumed in *Doe d. Blackwell v. Plowman*, 2 B. & Ad. 573 ; but that was put by Parke, J., expressly on the ground that it was the case of a marriage settlement, in which it is not usual in point of practice to notice attendant terms. [*Cresswell*, C. J. What ground is there for presuming that Hill had surrendered these terms, when we find his representatives dealing with them ?] Supposing, then, that the court cannot presume those terms to have been surrendered, they cannot help Mark Devey's

1855.

COTTRELL

v.
HUGHES.

1855.
COTTRELL
v.
HUGHES.

title. Those terms have by the statute 8 & 9 Vict. c. 112, ceased and determined. The 1st section of that statute, after reciting "that the assignment of satisfied terms had been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate," enacts "that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, *except* that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st of December, 1845, and shall, for the purpose of such protection, be considered in every court of law and of equity to be a subsisting term." That clause came under consideration in *Doe d. Cadwalader v. Price*, 16 M. & W. 603. There A., in 1839, died seised in fee of lands, of which his eldest son, B., was his tenant: on his death, B., supposing him to have died intestate, entered on the lands claiming them as heir-at-law, and in 1830 mortgaged them in fee, and levied a fine to confirm the mortgage; and at the same time an outstanding term of 500 years was by his direction assigned to a trustee for the mortgagee: in 1835, B. sold the estate to the defendant, who paid off the mortgage; the legal estate in fee and the equity of redemption were conveyed to the defendant, and the term was assigned to a trustee for him, to attend the inheritance: in 1845, it was discovered

that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee to whom the term was assigned in 1835: and it was held, that, by the operation of the 8 & 9 Vict. c. 112, the term had absolutely determined, and that the plaintiff could not recover upon the demise laid in the name of the trustee. Parke, B., in delivering judgment, said: "As the plaintiff has in his declaration a demise by a trustee of the term, added to that of the real claimant of the property, we must decide whether that satisfied term did or did not continue after the 31st of December, 1845; and, in order to do this, we must also determine whether the party claiming the protection of the term was really entitled to that protection against an incumbrance; and, as that is a question of equity, we have thrown on us the duty of a court of equity, without adequate machinery. Such, however, is the operation of the act, and we must therefore decide whether the defendant, who was in possession, wanted the protection of this term. Now, as we have already held that he did not, seeing that he had the legal estate wholly independent of the term, his case does not fall within the latter part of the 1st section of the statute; but it falls within the former part of it; the effect of which is, that the term actually ceased and determined, by the operation of the act, on the 31st of December, 1845, and consequently the plaintiff cannot recover on the demise of the trustee of the term. If it had turned out that the defendant wanted the protection of the term, on the ground that he was a purchaser for valuable consideration, it would be necessary for us to determine what course he ought to take; probably it would be necessary for him to apply to a court of equity, or to apply to this court to strike out of the declaration the demise in the name of the trustee; but, as

1855.

COTTRELL
v.
HUGHES.

1855.

COTTRELL
v.
HUGHES.

he does not want the protection of the term, it has absolutely ceased and determined on the 31st of December, 1845." [*Jervis*, C. J. That case helps you to a certain extent: it shews that the plaintiff does not need the protection of the term, but that the defendant does, —at least during the life of Thomas Swinfen Cottrell.] *Doe d. Hall v. Mouldsdale*, 16 M. & W. 689, is also in point. In 1784, premises were leased to H. J. for three lives. H. J. by his will devised all his estate and interest in the premises to his wife A. J., her heirs and assigns. A. J., in 1793, conveyed the estate so devised to her, to her son R. J., and the heirs of his body, with a proviso, that, if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A. J., her heirs and assigns. In 1811, R. J. purchased the reversion in fee in the premises, expectant on the lease for lives, which was duly conveyed to him, and at the same time an old satisfied term of 5000 years affecting the premises was assigned to a trustee for him, to attend the inheritance. R. J. died in 1812, without issue, leaving his nephew L. J. his heir-at-law, and the heir-at-law of A. J. The lease for lives determined in 1835. And it was held, that, since the statute 8 & 9 Vict. c. 112, the outstanding term would have been no defence to an ejectment by L. J., or any person claiming under him. [*Jervis*, C. J. The decision there being against the lessor of the plaintiff on another ground, the court did not expressly decide this point; and the term was set up by the defendant.] That is so: but, Parke, B., in delivering judgment, says, —"It becomes unnecessary to consider the effect of the satisfied term proved by the defendant to exist, though we have no doubt that it is to be deemed to have absolutely ceased and determined, under the statute 8 & 9 Vict. c. 112, s. 1, on the 31st of December, 1845, and consequently would have afforded no defence to this

ejectment." Upon these authorities, it is submitted these two terms afford no title to this defendant. [*Jervis*, C. J. How would it have been in equity?] Nothing has been found, calculated to throw any light upon that question; though probably equity would decree that the terms should attend the altered condition of the estate. [*Jervis*, C. J. Otherwise, it would be making the remainder-man bear the incumbrance of the tenant for life. It would in effect be enlarging the life-estate to a fee.]

1855.

 COTTRELL
 v.
 HUGHES.

Keating (with whom was *Phipson*), contra. (a) It is conceded, that, supposing the statute 8 & 9 Vict. c. 112 not to have passed, the plaintiff in this case would not have been entitled to recover. [*Jervis*, C. J. Upon a technical point merely,—because he had no *legal* title.] It is submitted,—first, that, in a court of law, the defendant is entitled to be placed in the same situation as if the statute had never passed,—secondly, that, if this court can give the same construction that a court of equity would have given, the defendant is entitled to the full protection of these two outstanding satisfied terms.

(a) The points marked for argument on the part of the defendant were as follows:—

"That the assignment before the 31st of December, 1845, of the two terms of one thousand years created by the indentures of the 12th of June, 1762, and the 29th of June, 1763, respectively, to a trustee for Mark Devey, and to attend the inheritance, gives a good title to the defendant, claiming under him, and is a defence to this action,—8 & 9 Vict. c. 112:

"That the recovery suffered in Easter Term, 53 G. 3,—

1813,—was valid; and therefore that a fee-simple in the premises passed from Thomas Swinfen Cottrell the elder to Mark Devey by the indentures of the 22nd and 23rd of December, 1839, and the 26th and 27th of October, 1840:

"That the indenture of the 4th of May, 1813, under which the plaintiff claims, so far as respects the uses thereby declared, was voluntary, and void as against Mark Devey, the subsequent purchaser for valuable consideration,—27 Eliz. c. 4; 39 Eliz. c. 18."

1855.

COTTRELL

v.

HUGHES.

The words of the statute are so strong that they cannot be got over. It enacts (s. 1) "that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid." And then comes the exception, upon which the defendant relies,— "except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st of December, 1845, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term." The effect of that statute is, to place the defendant in precisely the same situation, both at law and in equity, as he stood in before the passing of that act. In *Doe d. Cadwalader v. Price*, the declaration contained a demise by the trustee of the term. Here, there is no demise by the trustee of the term: the plaintiff claims under a deed of appointment. The point now under discussion was not the point in judgment in *Doe d. Hall v. Mouldsdales*. [*Jervis*, C. J. No: but it follows upon *Doe d. Cadwalader v. Price*, where the statute was considered, and the point expressly decided.] In the course of the argument in *Doe d. Cadwalader v. Price*,—16 M. & W. 611,—it was suggested that "if the outstanding term is merged in the inheritance by the operation of the 8 & 9 Vict. c. 112, it can afford the defendant no protection at law: if it is not, the plaintiff is entitled at law to recover on the demise in the name of the termor. If it still subsists at

all, as it was assigned by express declaration to attend the inheritance, the statute must be construed to mean that it is to subsist to protect the party entitled to the inheritance, in whomsoever the right may be shewn to be." But to this Parke, B., did not assent. "It must surely," he said, "mean that it is to subsist to protect the estate of the defendant, who was a purchaser for value without notice, and for whose benefit it was assigned." [Williams, J. The term is actually dead by reason of the statute: the exception applies only where the term attends the inheritance, not merely by reason of a rule of equity, but by the express declaration of the parties.] The court must look at it as a court of law. [Servis, C. J. It cannot be a mere legal question. In *Doe d. Cadwalader v. Price*, it is plain the court looked to the quality of the estate. It was the plaintiff who claimed the protection of the term there. Williams, J. If you make out that *any body* wants it, it is a subsisting term.] In a court of equity, the defendant clearly would have been entitled to use these terms for his protection: it is so laid down by Lord Eldon in *Cholmondeley v. Clinton*, 4 Bligh, 1, 87. "We have long laid it down," said his Lordship, "and I understand it to be still the law of the land, that, if I lend my money on a mortgage, and the noble Lord who sits near me afterwards lends his money upon a mortgage of the same estate, having no notice of my mortgage; if he goes to the trustee of an old term, and gets in that term, having no notice to affect his conscience that I have a mortgage before, although that term was held prior to his getting it in, in trust, first for me, and then for him; yet, his conscience not being barred against the getting in that term, he will protect himself by that term; that is, he shifts the equity which was first in me into himself, and by his diligence he gets the advantage, which by my negligence

1855.

 COTTRELL
v.
HUGHES.

1855.

COTTRELL
v.
HUGHES.

I have lost." [*Cresswell, J.* That is like the case of a third mortgagee getting in a first mortgage, which entitles him in equity to tack. But, what equitable title has a purchaser in fee who purchases from a tenant for life?] It is the very weakness of the legal title that renders the protection of the term necessary. In *Jones v. Powles*, 3 Mylne & Keen, 581, this protection was afforded to one who became a purchaser under a forged will. Sir John Leach, M.R., when the case came first before him, intimated an opinion "that the protection afforded by the legal estate, might possibly be confined in equity to such bonâ fide purchasers only as derived their estate from a party who was capable, or who, but for some secret act of his own, would have been capable of passing some estate." But, after a second argument, his Honour said,—p. 598: "My impression at the opening of this case, was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but, upon full consideration of all the authorities which have been referred to, and the dicta of judges and text-writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence. That is the situation in which the defendant stands. There was no reasonable ground for suspicion that the will was forged: a long possession had followed

the alleged devise, and no reasonable diligence could have led to a discovery of the forgery." These terms, therefore, are clearly subsisting, and must be dealt with by the court as if the statute had never passed.

1855.

 COTTRELL
 v.
 HUGHES.

Whateley, in reply. Nothing can be plainer than that, where a term is assigned to attend the inheritance, it follows the estate, and affords protection to the person whose inheritance it is assigned to attend. It is said that the court cannot without the intervention of a jury presume the terms to have been surrendered. But it is clear, from *Doe d. Cadwalader v. Price*, that this court has jurisdiction as a court of equity as well as of law; and that, under the circumstances disclosed in this case, a court of equity would presume them surrendered. *Doe d. Putland v. Hilder* is expressly in point. [*Cresswell*, J. If we are sitting as a court of law, we must have a jury. If as a court of equity, we must have recourse to the authorities in equity. In the last edition of Sir E. Sugden's *Vendors and Purchasers* (11th edit.), p. 1148, it is said: "Since the decision in *Doe v. Hilder*, the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years, which, they insisted, ought to be presumed to have been surrendered; but the general and prevailing opinion has been that that doctrine cannot be maintained: and the Masters have acted upon that principle. And, finally, in *Aspinall v. Kempson*, MS., upon a motion before Lord Eldon for a new trial, in which some gentleman at the common law bar cited *Doe v. Hilder*, he observed,—'It is not necessary to consider much the doctrine of presumption with reference to the present case; but, the case of *Doe v. Hilder* having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not

1855.
 COTTRELL
 v.
 HUGHES.

have directed a jury to presume a surrender of the term in that case; and, for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case.' We may, therefore, be justified in considering the law to stand as it did before the decision in *Doe v. Hilder*: and conveyancers of course will follow the advice of Lord Eldon, and not depart from the practice they have hitherto followed." And he refers to *Doe d. Blackwell v. Plowman*, 2 B. & Ad. 573, where Lord Tenterden observed that the doctrine laid down in *Doe d. Burdett v. Wrighte*, 2 B. & Ald. 710, and *Doe d. Putland v. Hilder*, had been much questioned.] Sir E. Sugden, however, refers to two cases,—*Emery v. Grocock* and *Ex parte Holman*,—before Sir John Leach, where that very learned judge presumed terms to have been surrendered, under circumstances very like those of the present case. *Doe d. Putland v. Hilder* has never been overruled: and, however good the advice of Sir E. Sugden may be to conveyancers, to treat the doctrine with caution, it is not upon such grounds to be wholly disregarded. [*Jervis*, C. J. The difficulty is as suggested by my Brother Cresswell, that, if you are addressing us as a court of law, we want the assistance of a jury to enable us to make the presumption; and, if you address us as a court of equity, we find that the doctrine you rely on has found no favour there.] The equities on the side of the plaintiff are clearly stronger than those on the side of the defendant; and it is submitted that the plaintiff is, for the reasons suggested, entitled to judgment.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:—

In this case, it appears, that, in the year 1840, Thomas

Swinfen Cottrell the elder, the father of the plaintiff, assuming and covenanting that he was seised in fee, sold the estate in question to Mark Devey (with whom the defendant may be considered as identical). On that occasion, two satisfied terms for one thousand years were assigned to a trustee for Mark Devey to attend and protect the inheritance. These terms had been originally created for mortgage purposes, and, the mortgage debts having been satisfied, had been, as early as the year 1778, assigned to one Hill, in trust to attend the inheritance, for the benefit of Joseph Cottrell the elder, the great-grandfather of the plaintiff, who was then seised in fee. The terms were assigned to the trustee for Mark Devey by Hill's legal personal representatives. But, in truth, the plaintiff's father, Thomas Swinfen Cottrell the elder, was not seised in fee, but only tenant for life, with remainder to such of his children as he should appoint. The estate had been so limited by a settlement made by him and his father, Joseph Cottrell the younger, in the year 1813.

The estate had been previously settled in the year 1778, in strict settlement, on the marriage of the plaintiff's grandfather, Joseph Cottrell the younger. But, in neither of those settlements was any notice taken of the outstanding terms. Mark Devey had no notice of the settlement of 1813 before he became the purchaser of the estate.

In 1844, the plaintiff's father duly executed the power conferred on him by that settlement; and he thereby limited the estate, after his own death (which took place in 1853), to his eldest son, the plaintiff.

No objection was made on the argument, by the counsel for the defendant, to the validity of the settlement, which, so far as relates to the inheritance, being prior to the sale to Mark Devey, is plainly paramount to his title. It is equally clear, that, if the terms for

1855.

COTTRELL

v.

HUGHES.

1855.

COTTRELL
v.
HUGHES.

one thousand years are to be regarded as still subsisting, the plaintiff cannot recover in this action, because they precede the estate acquired by him under the settlement of 1813, and, consequently, the title to the legal possession for the remainder of those terms is not in him, but in the assignee of the terms. But it was contended, on the part of the plaintiff, that the terms ought not to be regarded as still subsisting.

The first ground which his counsel urged on behalf of this proposition, was, that it must be presumed by the court that they had been surrendered before they were assigned, on the occasion of the sale to Mark Devey ; and for this the case of *Doe d. Putland v. Hilder*, 2 B. & Ald. 782, was relied on. That case is certainly an authority to shew that it might have been left to a jury to presume the surrender. But it is well known that the decision of *Doe d. Putland v. Hilder* created great dissatisfaction among conveyancers. It was subjected to observations by Mr. Sugden, in the shape of a printed letter to Mr. Butler, to which it was difficult, if not impossible, to give an answer. They were inserted by the same writer in subsequent editions of his Treatise on the Law of Vendors and Purchasers, and accompanied by a statement, that, since the decision in *Doe d. Putland v. Hilder*, the point had been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years, which they insisted ought to be presumed to have been surrendered ; but that the general and prevailing opinion had been that that doctrine could not be maintained ; and the Masters had acted upon that principle. And it is added, that, in *Aspinall v. Kempson*, Sugden's V. & P., 11th edit., p. 1148, upon a motion before Lord Chancellor Eldon for a new trial, in which some gentlemen at the common law bar cited *Doe d. Putland v. Hilder*, his Lordship observed,—“ It is not necessary to

consider much the doctrine of presumption, with reference to the present case; but, the case of *Doe d. Putland v. Hilder* having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and, for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case."

We should, therefore, probably decline to act on the authority of *Doe d. Putland v. Hilder*, if the occasion called for it, notwithstanding it may not have been expressly overruled in a court of law. But it is plain, even according to that case, that the presumption, if it is to be made at all, must be made by a jury, and not by the court; and that we cannot presume a surrender which is not stated as a fact in the special case on which we have to give our opinion.

The remaining ground taken by the plaintiff's counsel, was, that the terms have ceased and determined by reason of the statute 8 & 9 Vict. c. 112, by which it is enacted that every satisfied term of years which either by express declaration or by construction of law shall, upon the 31st of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine, but with an exception that every such term which shall be so attendant by express declaration, although made to cease, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st of December, 1845, and shall for the purpose of such protection, be considered in every court of law and equity to be a subsisting term.

1855.

 COTTRELL
 v.
 HUGHES.

1855.

COTTELL
v.
HUGHES.

The question, then, is, whether the terms are within the exception contained in this statute.

The terms were unquestionably attendant on the inheritance, by express declaration, on the 31st of December, 1845: and it only remains to be inquired whether they would have afforded protection to Mark Devey (and those who may be regarded as identical with him), if they had continued to exist.

We agree with the opinion of the court of Exchequer expressed in *Doe d. Cadwalader v. Price*, 16 M. & W. 603, that the protection to be afforded is not merely such as might have been set up in a court of law, but such as that a court of equity would not have restrained its being so set up. Now, it appears to be quite clear that a court of equity would not have restrained the setting up of these terms in a court of law by Mark Devey for his protection.

The long-established doctrines of the courts of equity on this subject, are so fully and clearly explained in Butler's note to Co. Litt. 290. b., note 249, § xiii, that it may be expedient to state the very words of that learned writer, which are as follows:—"Though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law, and the whole benefit and advantage to be made of the term arises from this separation; for, if two persons, or more, have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it, that, if any one of them obtains an assignment of it, then (unless he is affected by any of the circumstances which equity considers as fraudulent) he will be entitled, both at law and in equity, to the estate for the whole continuance of the term, to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of

every kind of benefit in the land. Supposing, therefore, A. purchases an estate, which, previous to his purchase, had been sold, mortgaged, leased, and charged with every kind of incumbrance to which real property is subject; in this case, A. and the other purchasers, and all the incumbrancers, have equal claims upon the estate. This is the meaning of the expression that their equity is equal. But, if there is a term of years subsisting in the estate, which was created prior to the purchases, mortgages, and other incumbrances, and A. procures an assignment of it in trust for himself, this gives him the legal interest in the lands during the continuance of the term, absolutely discharged from, and unaffected by, any of the purchases, mortgages, and other incumbrances, subsequent to the creation of the term, but prior to his purchase. This is the meaning of the expression in assignments of terms, that they are to protect the purchaser from all mesne incumbrances. But it is to be observed, that A., to be entitled in equity to the benefit of the term, must have all the following requisites: he must be a purchaser for a valuable consideration; his purchase must in all respects be a fair purchase, and free from every kind of fraud; and, at the time of his purchase, he must have no notice of the prior conveyance, mortgage, charge, or other incumbrance. It is to be observed that mortgagees, lessees, &c., are purchasers in this sense, to the amount of their several charges, interests, or rights. If any person of this description, unaffected by notice or fraud, takes a defective conveyance or assignment of the fee, or of any estate carved out of it,—defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also takes an assignment of a term to a trustee for himself, or to himself, where he takes the conveyance of the inheritance to his trustee: in each of these cases, he is entitled to the full benefit of the term, that is, he may use the legal

1855.

 COTTELL
 v.
 HUGHES.

1855.

COTTELL
v.
HUGHES.

estate of the term to defend his possession during the continuance of the term; or, if he has lost the possession; to recover it at common law, in preference to all claimants prior to his purchase, but subsequent to his term."

It thus appears that the defendant (as representing Mark Devey) is a person of whom it may be properly said that the attendant terms would have afforded him protection against the settlement under which the plaintiff claims, if they had continued to subsist; and, consequently, by the express terms of the statute, we must consider them to be subsisting terms.

The plaintiff, therefore, has no title to the possession, and our judgment must be for the defendant.

Judgment for the defendant.

Jan. 23.

KNIGHT v. CAMBERS.

It is no answer to an action for money paid by the plaintiff for the defendant's use, at his request, that the money was paid in respect of losses on wagering contracts made void by the statute 8 & 9 Vict. c. 109, s. 18.

DECLARATION for money payable by the defendant to the plaintiff for work done by the plaintiff for the defendant at his request, and for commission due and payable to the plaintiff in respect thereof; and for stock, shares, goods, and chattels sold and delivered by the plaintiff to the defendant; and for stock, shares, goods, and chattels bargained and sold by the plaintiff to the defendant; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the use of the defendant, at his request; and for money received by the defendant to the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. Claim, 15,000*l*.

Seventh plea,—to 853*l*. 5*s*., part of the plaintiff's claim for money alleged to be payable by the defendant to the plaintiff for money paid by the plaintiff for the de-

defendant's use,—that, after the passing and coming into operation of the statute of 8 & 9 Vict. c. 109, intituled “An act to amend the law concerning games and wagers,” the plaintiff, to wit, on behalf of some person or persons to the defendant unknown, knowingly made and negotiated, and entered into, with the defendant, certain contracts for the pretended sale of certain shares of and in a certain company, called, to wit, The Crystal Palace Company, which said contracts were respectively contracts by way of gaming and wagering, contrary to the form of the statute in such case made and provided, in this, that the said contracts were respectively in truth and in fact wagers made on the several days of the making of the said contracts respectively, respecting the market-price and value of the said shares respectively on certain days then to come (and which had come and elapsed before the commencement of the suit); and by the said wagers and contracts the plaintiff agreed with the defendant, that, if the price and value of the said shares respectively should be higher on the said future days respectively than on the respective days when the said wagering contracts were respectively made as in that plea was mentioned, the defendant should receive from the plaintiff the amount of the difference between the price and value of the said shares respectively on the several days when the said wagering contracts respectively were made, and the market-price or value on the said future days respectively; and, if the price or value thereof should be less on the said future days than on the said respective days when the said wagering contracts were respectively made as aforesaid, the defendant should pay to the said plaintiff the amount of the difference between the price and value thereof on the said days on which the said wagering contracts respectively were made as aforesaid, and the price or market value thereof on the said future days respectively: That it

1855.

KNIGHT
v.
CAMBERS.

1855.

 KNIGHT
 v.
 CAMBERS.

never was intended that any share or shares should be actually bought or sold in pursuance of the said wagering contracts as aforesaid or otherwise, but that such differences alone should be paid or received by the defendant as aforesaid: That none of the said shares were ever assigned, transferred, or delivered to the defendant, and that the price and value of the said shares was less on the said respective future days than on the days when the said wagering contracts were so entered into as aforesaid, whereby under such illegal contracts certain sums were to be paid by the defendant to the plaintiff: And that the money paid in the introductory part of this plea mentioned, and to which the plea was pleaded, was paid, as in the declaration mentioned, for and in respect of the said differences and sums so to be paid by the defendant as aforesaid under the said alleged contracts, and not otherwise.

To this plea the plaintiff demurred, alleging for ground of demurrer, that the plea did not shew that the money was paid illegally or for any illegal purpose, that it did not shew *how* the money was paid, and that it was wholly irrelevant. Joinder in demurrer.

Channell, Serjt., in support of the demurrer. The statute 8 & 9 Vict. c. 109, s. 18 (a), does not make gam-

(a) Which enacts "that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of

any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

ing and wagering contracts illegal, or the payment of losses under such contracts illegal: nor does it apply to claims for money paid at the request of a defendant in fulfilment of such contracts. The plea does not shew that the plaintiff's claim is not one of those exempted from the operation of s. 18 of the act: nor does it shew that the payments were illegal, or that the plaintiff knew that the contracts were by way of gaming or wagering: and it admits that the money was paid at the defendant's request. It is perfectly consistent with the plea, that, after the losses, the defendant went to the plaintiff and asked him to pay the money. [*Maule, J.* Assuming the original contracts to have been void, there is nothing to prevent the plaintiff from recovering money afterwards paid by him at the defendant's request.]

1855.

 KNIGHT
v.
CAMBERS.

Prentice, contra. This is an attempt to evade the statute. The alleged sales were a mere pretence, time bargains. [*Maule, J.* That reduces it to a wager. Suppose it were so, and the defendant asks the plaintiff to pay the money for him?] In that case, no doubt, he would be liable. The plea alleges that the plaintiff was cognisant of all the circumstances.

Per Curiam. The plea is clearly bad; and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

1855.

Jan. 23.

KNIGHT v. FITCH.

To an action for "stock, shares, scrip, goods, and chattels bargained and sold and delivered by the plaintiff to the defendant, and for work and labour and materials and for commission due and payable in respect thereof, and for money paid by the plaintiff for the defendant at his request, and for money due on an account stated,"—the defendant pleaded,—as to so much of the

claim as related to money payable by the defendant to the plaintiff for the said work and materials and commission, and for money paid by the plaintiff, and for money due from the defendant upon the said accounts stated,—that the plaintiff was a stock and share broker, and that the defendant employed him as such broker, after the passing and coming into operation of the said act of parliament (referring to the 8 & 9 Vict. c. 109, mentioned in a former plea), to enter into, and the plaintiff accordingly entered into, on his behalf, certain contracts by way of gaming and wagering, "contrary to the form of the statute," that is to say, certain wagering contracts, under the semblance of pretended sales, respecting the market price and value of certain *public and other stock, shares, scrip, and goods, and chattels*, on certain days then to come, whereby, under pretence of contracts, the plaintiff agreed with divers persons whose names were to the defendant unknown, that, if the price and value of the said public stock and shares, scrip, goods, and chattels, should be lower, &c., and vice versa, "differences" should be paid. The plea then went on to allege, that no real sale was intended, and that the plaintiff knew it; and that the work and labour in the declaration mentioned was done, and the commission claimed, in respect of the making of the said wagers and contracts in the plea mentioned; and that the money paid by the plaintiff was paid by him as such broker in settling such differences:—

Held, that the plea was no answer to the action.

Semble, that it was substantially a plea founded on the 8 & 9 Vict. c. 109, s. 18: but that, if it was to be treated as a plea founded on the stock-jobbing act, 7 G. 2, c. 8, it should have shewn that each of the contracts mentioned therein involved a dealing in *public stock*.

DECLARATION for money payable by the defendant to the plaintiff, for stock, shares, scrip, goods and chattels, bargained and sold by the plaintiff to the defendant: and for stock, shares, scrip, goods and chattels, sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request, and for commission due and payable to the plaintiff in respect thereof; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. Claim, 100,000*l*.

Fifth plea,—As to so much of the plaintiff's claim as relates to money payable by the defendant to the plain-

tiff for the said work and materials and commission, and for money paid by the plaintiff, and for money due from the defendant upon the said accounts stated,—that the plaintiff was and is a stock and share broker of the city of London, and that the defendant retained and employed the plaintiff as such broker, for reward to the plaintiff in that behalf, after the passing and coming into operation of the said act of parliament (a), to make and enter into on behalf of the defendant, and the plaintiff then, in pursuance thereof, made and entered into for the defendant, certain contracts by way of gaming and wagering, *contrary to the form of the said statute*, that is to say, certain wagering contracts, under the semblance of pretended sales by the defendant to such persons (b) respecting the market-price and value of certain *public and other stock, shares, scrip, and goods and chattels*, on certain days then to come, whereby, under pretence of contracts, the plaintiff agreed with divers persons whose names are to the defendant unknown,—being the persons with whom the plaintiff so contracted for the defendant, that, if the price and value of the said public stock and shares, scrip, goods and chattels should be lower on the said future day than on the respective days when the said wagering contracts were respectively made as in that plea was mentioned, he, the defendant, should receive from the said persons the amount of the difference between the value of the said public and other stock and shares, scrip, goods and chattels respectively on the several days when the same wagering contracts respectively were made, and the market value on the said future days; and, if the price and value thereof should be higher on the said future

1855.

 KNIGHT
 &
 FITCH.

(a) Referring to the 8 & 9 Vict. c. 109, mentioned in a former plea. (b) "to certain persons to the defendant unknown."

1855.

KNIGHT
v.
FITCH.

days than on the respective days when the said wagering contracts were respectively made as aforesaid, the defendant should pay to the said persons respectively the amount of the difference between the value thereof on the said days on which the said wagering contracts respectively were made as aforesaid and the market value thereof on the said future days: That it never was intended that any stock, shares, or share scrip, or goods or chattels should be actually bought by such persons, or sold or delivered by the defendant, in pursuance of the said wagering contracts as aforesaid, or otherwise, as he the plaintiff always well knew, but that such differences alone should be received or paid by the defendant as aforesaid: That the said work and materials mentioned in the declaration were done and provided by the plaintiff for the defendant in and about the making and entering into the said wagers and contracts in that plea aforesaid, and incidental thereto, and the said commission was claimed by the plaintiff as his commission as such broker as aforesaid in respect of the said work and materials: And that the money so paid by the plaintiff as in the declaration mentioned, was paid by the plaintiff in the settling and discharging differences which had become payable to the said persons upon the said wagers and contracts so made by the plaintiff as such broker as in that plea aforesaid, he the plaintiff having, as such broker, at the defendant's request, and as the custom was amongst brokers, made the said wagers and contracts in his, the plaintiff's, own name as a principal, without disclosing the name of the defendant: and that the said accounts stated were had and stated by the defendant with the plaintiff of and concerning the said work, materials, and commission, and the said money so paid, as in that plea aforesaid.

To this plea the defendant demurred, alleging for ground of demurrer, that the plea did not shew the

plaintiff's claim to be illegal, and that the facts stated did not constitute a defence. Joinder in demurrer.

1855.

KNIGHT

v.

FITCH.

Lush, in support of the demurrer. The plea in this case differs somewhat from the plea in the last case,—*Knight v. Cambers*,—but it is equally bad. The statute 8 & 9 Vict. c. 109 does not make gaming or wagering contracts, or the payment of losses under such contracts, illegal; nor does it apply to claims by a stock or share broker against his principal. The plea does not shew that the claim is not one of those excepted from the operation of the 18th section of the statute; nor does it disclose any answer to the claim for money paid, inasmuch as it admits that the money was paid by the defendant's authority, and pursuant to the custom among brokers,—or any answer to the claim for work and materials and commission, the work done not being illegal,—or any answer to the claim upon accounts stated, the consideration upon which they were founded (or some of them) not being illegal, and the defendant being at least under a moral obligation to pay: neither does the plea shew that the plaintiff knew that the defendant only intended to make contracts by way of gaming and wagering.

Thompson Chitty, contra. It cannot now be contended that money paid by the plaintiff at the request of the defendant for losses on wagering contracts made void by the statute 8 & 9 Vict. c. 109, cannot be recovered. But it is submitted that this is a good plea, independently of that statute: it shews that the work was done, and the commission earned, in the negotiation of contracts as to the future price of public stocks, which *primâ facie* means English stocks, which are strictly prohibited by the 7 G. 2, c. 8, ss. 4, 5. [*Jervis*, C. J. The plea is not confined to public stocks.] It states

1855.

 KNIGHT
 v.
 FITCH.

that each contract related to all the things mentioned; and it is clear that a man cannot recover commission for aiding another in the infraction of the law. [*Maule, J.* Does not the reference to the former plea tie it down to the statute of 8 & 9 Vict. c. 109?] The words "contrary to the form of the said statute" may be rejected as surplusage. [*Maule, J.* I doubt that: they serve to explain what the plea means. The plea only says the contracts referred to are illegal in so far as they are contrary to the statute 8 & 9 Vict. c. 109. Rejecting the words proposed to be rejected, supposing the contracts were in respect of *foreign* stocks, which are not within the 7 G. 2, c. 8 (a), the plea would yet be satisfied. To make this a good plea, it must not only allege something to shew that the declaration could not be proved, but it must also shew that the contracts were *necessarily* illegal.] The words proposed to be rejected would not make this a good plea under the statute of 8 & 9 Vict. c. 109: it would be necessary to shew on the face of the plea *how* the contracts are contrary to the statute. In *Grizewood v. Blane*, antè, Vol. XI, p. 526, the declaration alleged a contract for the sale by B. to A. of railway shares at a certain price, and a subsequent contract for the sale by A. to B. of other railway shares at an *advanced* price, and an agreement that the two sets of shares should be set off against each other, and the *differences* paid by B. to A.: and it was held, that a *general* plea of gaming, founded on the 18th section of the 8 & 9 Vict. c. 109, was bad on special demurrer; for, that it ought to have shewn the circumstances relied on to bring the transaction within the act. And *Maule, J.* said: "The illegality complained of should not be stated by way of simple inexplicit allegation, but it

(a) See *Wells v. Porter*, 3 *ley v. Rigby*, 3 Scott, 194; 2 Scott, 141, 2 N. C. 722; *Oak-* N. C. 732.

should be an allegation of facts which will enable the court to see whether or not the transaction is within the prohibition of the statute." In a subsequent stage of the same case,—*antè*, Vol. XI, p. 588,—a colourable contract for the sale and purchase of railway shares, where neither party intends to deliver or to accept the shares, but merely to pay "differences" according to the rise or fall of the market, was held to be *gaming* within the 18th section. Assuming that the allegation in question is to be taken to be an allegation that the contracts were contrary to the statute 8 & 9 Vict. c. 109, if it plainly appears (as, it is submitted, it does,) that the contracts in respect of which the plaintiff is seeking to recover are within the stock-jobbing act, the plea is a good one. [*Jervis*, C. J. *Primâ facie*, the words of the plea,—which are to be taken most strongly against the defendant,—import divers contracts for divers things mentioned in the plea. To raise this point, the plea should shew that there was no contract except such as involved a dealing in public stock.] It is submitted that the plea does sufficiently shew that. [*Maule*, J. If this plea had been put in issue, and at the trial the defendant had offered to sustain it by proof of different contracts as to public stocks, and as to goods, he would have succeeded.]

1855.

 KNIGHT
 v.
 FITCH.

JERVIS, C. J. I doubt whether you have any right to raise this point, or whether the defendant has not tied himself down to a substantive defence on the statute 8 & 9 Vict. c. 109. It is not necessary, however, to decide that.

Chitty prayed leave to amend the plea, by restraining it to contracts for the sale of public stocks, and commission for the making of those contracts.

1855.

KNIGHT

v.

FITCH.

JERVIS, C. J. I think you must go to a judge at Chambers, with an affidavit, to ask for that.

MAULE, J. If he is well advised, the defendant will not make the application when I am there; for, I certainly should not allow the amendment so late.

The rest of the court concurring,

Judgment for the plaintiff.

FARNELL and Another, Churchwardens of the Parish of
ISLEWORTH v. SMITH.

Nov. 23.

A rate may be made, under the provisions of the 58 G. 3, c. 45, ss. 59, 60, for the purpose of paying the principal and interest of money borrowed in the manner provided by that act, at a meeting of which the notice required by the 25th section of the 59 G. 3, c. 134, has not been given,—the latter statute not repealing the former, but merely providing a further mode of raising the necessary funds.

THE following case was by order of a judge stated for the opinion of this court:—

An additional burial-ground being required for the parish of Isleworth, in the county of Middlesex, it was, at a vestry meeting of the said parish duly held on the 4th of June, 1847, unanimously resolved that the sum of 1200*l.* should be offered to the owners of a piece of land adjoining the churchyard, for the purchase of the same, to be converted into an additional burial-ground: and, the said offer having been accepted, it was, at another vestry meeting of the parish duly held on the 16th of June, 1847, unanimously resolved that the sum of 1200*l.* which was necessary for the said purchase should be borrowed, upon the credit of the rates of the parish, of John Farnell, Esq. (who was willing to lend the same) at 5 per cent. interest, and to be repaid in eight years, by equal instalments, and that an application be made to Her Majesty's commissioners for building new churches to approve of the said sum of 1200*l.* being borrowed, and to authorise and empower the parish

to make the proposed purchase, and to make rates for the same, and for the re-payment, with interest at 5 per cent., and in the manner before mentioned, of the said sum of 1200*l.*: and no dissent of any proprietor of any messuage, land, or tenement within the parish was entered in the book containing the proceedings of the said vestry meeting, or was otherwise signified.

1855.

FARNELL
v.
SMITH.

An application was made to the said commissioners according to the said resolutions; and they thereupon, before the 5th of August, 1847, approved of the proposed purchase and borrowing the said sum of 1200*l.*, and authorised and impowered the parish to make and complete the purchase, and to make, raise, levy, and collect rates for the repayment of the said sum of 1200*l.* with interest at the rate and in the manner before mentioned.

Application to,
and approval
of, the commis-
sioners.

The consents of the bishop of the diocese and of the incumbent of the parish to the proposed purchase and borrowing of the sum of 1200*l.*, and charging the same upon the said parish, were likewise, before the said 5th of August, duly given and signified; and the said sum of 1200*l.* was accordingly paid and advanced by Mr. Farnell to the churchwardens of the parish, for the purpose of the said purchase; and the said piece of land was purchased by the churchwardens, and conveyed to the said commissioners for building new churches and their successors, and converted into a burial-ground.

Consent of the
bishop and in-
cumbent.

The churchwardens of the parish, by a deed-poll under their hands and seals, duly charged the said parish with the said sum of 1200*l.* and interest.

At a vestry meeting of the inhabitants of the parish held on the 5th of August, 1847, and at which the churchwardens were present, it was proposed, and carried unanimously, that a rate of 4*d.* in the pound on land and on houses be granted for the new burial-ground rate in the then present year; and a rate of 4*d.* in the pound

Vestry meeting
of Aug. 5, 1847.

1855.

FARNELL

v.

SMITH.

Notice.

was accordingly made, and signed by the churchwardens. The said Edward Smith (the defendant) was rated in the said rate at the sum of 1*l.* 10*s.*

Notice of the above vestry meeting, and of the place and hour of holding the same, and that it was holden, amongst other things, to determine the amount to be raised in the present year as a new burial-ground rate for payment of interest on the loan, and re-payment of a portion of the principal, and for the expenses that must necessarily be incurred in completing the purchase, and making the required arrangements, was given in the manner required by law for notices of vestry meetings, on the Sunday next before the said 5th of August, the same being *three days* at least before the day appointed for holding the said meeting.

Vestry meeting
of July 31,
1849.

At another vestry meeting of the inhabitants of the parish, held on the 31st of July, 1849, and at which the churchwardens were present, it was resolved that a further rate of 4*d.* in the pound on land and houses be granted for the new burial-ground rate; and a rate of 4*d.* in the pound was accordingly made, and signed by the churchwardens. The said Edward Smith (the defendant) is rated therein at the sum of 1*l.* 10*s.*

Notice.

Notice of the above vestry-meeting, and of the place and hour of holding the same, and the special purpose thereof, was given in the manner required by law for notices of vestry-meetings, on the Sunday next before the said 31st of July, the same being three days at least before the day appointed for holding the meeting.

Vestry meeting
of July 21,
1851.

At a vestry-meeting held on the 21st of July, 1851, and at another vestry-meeting held on the 7th of July, 1853, the churchwardens of the parish being present on both occasions, it was in like manner resolved that like rates of 4*d.* in the pound should be granted for the new burial-ground rate; and rates of 4*d.* in the pound were accordingly, after each of such vestry-meetings, made

and signed by the churchwardens : and the said Edward Smith (the defendant) is rated in each of such rates at the sum of 1*l.* 12*s.* 2*d.*

1855.

 FARNELL
 v.
 SMITH.

Notice.

Notices of these meetings, and of the place and hour of holding the same, and the special purposes thereof, were in like manner as before stated given on the Sundays next before, and three days at least before, the days appointed for the meetings.

It was agreed that the said several rates were not unreasonable or excessive, or more than sufficient to pay the interest upon the said sum of 1200*l.*, and the instalments of the principal, as the same became due and payable : but many of the persons rated thereby, and amongst them the said Edward Smith (the defendant), objected to pay the same rates, and disputed the validity thereof, on the ground that the said rates were made at vestry-meetings of which notice had not been given for *two successive Sundays* preceding the vestry-meetings.

Rates reasonable.

Objection.

An application had been made to Her Majesty's justices of the peace for the county of Middlesex, by the churchwardens of the parish, to enforce the payment of the said rates ; and the parties summoned to appear before the said justices for the non-payment thereof gave notice to the justices that they disputed the validity of the said rates ; whereupon the justices declined to proceed.

The question for the opinion of the court, was,—whether the said rates were valid and legal. If the court should be of opinion that they were valid and legal rates, it was agreed that judgment should be entered for the said churchwardens against the said Edward Smith, for the amount at which he was rated in and by the said rates, or such of them as the court should be of opinion were valid. If the court should be of opinion that none of the said rates were valid and legal, it was agreed that judgment should be entered for the said Edward Smith.

Question.

1855.

FARNELL
v.
SMITH.

58 G. 3, c. 45,
s. 59.

Section 60.

Couch, for the plaintiffs. (a) The question turns upon the construction to be put upon several sections of the 58 G. 3, c. 45, 59 G. 3, c. 134, 3 G. 4, c. 72, and 7 W. 4 & 1 Vict. c. 45. The 59th section of the 58 G. 3, c. 45, enacts "that it shall be lawful for the churchwardens of any parish, with the consent of the vestry or select vestry, or persons possessing the powers of vestry, and with the consent of the bishop and incumbent, and they are thereby authorized and empowered, to borrow and raise, upon the credit of the rates of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of *enlarging or otherwise increasing the accommodation in the then-existing churches or chapels* of such parish; and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced, for the re-payment of the principal thereof; or for re-paying such principal in such manner and at such times and in such proportions as shall be agreed upon with the persons advancing any such money." And the 60th section provided "that no application and offer to build and enlarge any church or chapel, either wholly or in part, by means of any rates upon any parish, should be made, unless the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, shall consent thereto, or, where any parish shall be under the care and manage-

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"The plaintiffs will contend that the provisions of the statutes 58 G. 3, c. 45, and 59 G. 3, c. 134, were duly complied with; and that, by virtue of the 3 G. 4, c. 72, s. 26, the

rates in question were properly made, and are valid. The plaintiffs will refer to ss. 59 and 60 of the 58 G. 3, c. 45, and s. 24 of the 59 G. 3, c. 134, as being more particularly applicable to the rates in question."

ment of any select vestry, or other select body, then with the consent of not less than four-fifths of such select vestry, by whatever name the same may be called, such consent to be certified, &c.; nor unless *two third parts in value* of the proprietors of messuages, lands, and tenements within such parish shall have consented thereto," &c. This last-mentioned provision is altered by the 59 G. 3, c. 134, s. 24, which enacts "that so much of the recited act as requires the consent of such proportion of proprietors of lands, in manner directed by the said act, shall be repealed; and that, from and after the passing of that act, no application and offer to build or enlarge any church or chapel, either wholly or in part, shall be made, nor shall any church or chapel be built or re-built or enlarged, or any purchase made of any new or additional burial-ground, by means of any rates upon any parish, in any case in which *one third part or more in value* of the proprietors of messuages, lands, and tenements within such parish shall *dissent* therefrom." And the 25th section enacts "that it shall be lawful for the inhabitants of any parish who shall be assembled or present at any vestry, or the major part of the inhabitants so assembled and present at any such vestry, of which notice shall have been given upon two successive Sundays preceding the meeting of such vestry, or for two third parts of such of the persons exercising the powers of vestry in such parish as shall be assembled at any meeting of which due notice shall have been given according to the mode of giving notices for the assembling of such persons, to order and direct the making and raising of any rate, not exceeding the amount of 1*s.* in the pound in any one year, or the amount of 5*s.* in the pound in the whole, upon the annual value of the property in the parish, for the purpose of building or enlarging any church or churches, or chapel or chapels, either wholly or in part, by means of rates, without any

1855.

 FARNELL
v.
SMITH.
59 G. 3, c. 134,
s. 24.

Section 25.

1855.

 FARNELL
 v.
 SMITH.

 3 G. 4, c. 72,
 s. 26.

further or other or any greater number of consents of any inhabitants or proprietors, or occupiers, or other persons, anything in the said recited act to the contrary, notwithstanding: provided always, that no greater or larger rate than aforesaid shall be ordered or directed to be made or raised in relation to any application or offer to build or to enlarge any church or chapel, either wholly or in part, by means of rates, if any such proportion of dissents as are in this act specified, are signified in writing in manner directed by this act: and the clause then goes on to provide for the levying of such rate in the same manner as church-rates. The 59 G. 3, c. 134, did not in express terms authorise the purchase of land for additional burial-grounds: the 26th section of the 3 G. 4, c. 72, therefore, seems to have passed for the purpose of removing all doubt. It enacts "that it shall be lawful for the commissioners to authorise and empower any parish, chapelry, township, or extraparochial place, which shall be desirous of procuring a burial-ground, or adding to any existing church or chapel yard or cemetery, to procure and purchase any such land or ground as may in the opinion of the commissioners be sufficient and properly situated for a church or chapel yard or burial-ground, or as an addition to any existing church or chapel yard or cemetery, and to make, raise, levy, and collect rates for purchase thereof, or for the re-payment with interest of any money borrowed for the making such purchase, at such times and in such proportions as shall be agreed upon with the person or persons advancing any such money, and approved of by the said commissioners: and the churchwardens or chapelwardens or persons authorised under the said recited acts [58 G. 3, c. 45, and 59 G. 3, c. 134,] to make rates for any of the purposes of the said recited acts, of any such parish, chapelry, township, or extraparochial place, may and shall in every such case use and exercise all the powers and authorities in the said

recited acts specified, as to making, raising, and levying any rates for any of the purposes of the said recited acts." The 1st section of the 7 W. 4 & 1 Vict. c. 45, reciting that by the 58 G. 3, c. 59 it is enacted "that no vestry or meeting of the inhabitants in vestry of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, *three days* at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel," repeals that provision so far as it directs *publication* of notices: and the 2nd section provides that notices theretofore usually given during or after divine service *in the church* or chapel, shall thenceforth be given by affixing the same *on the church doors* &c. A doubt was expressed by the court of Queen's Bench in *The Queen v. Abney*, 3 Ellis & B. 779, whether, under the statutes 58 G. 3, c. 45, and 59 G. 3, 134, a rate can be laid for the purpose of providing additional burying ground: but the 3 G. 4, c. 72, was not referred to. This case finds that the money was borrowed and the land purchased by the authority of the commissioners; and that the consent of the bishop and of the incumbent of the parish were duly obtained; and shews, it is submitted, that all the requisitions of the acts of parliament have been duly complied with so as to entitle the churchwardens to enforce the rate.

Needham, contra. This case was intended to raise the same question as that which was raised, but not decided, in *The Queen v. Abney*, viz. whether, in order to carry into effect the provisions of the statutes referred to, the vestry meeting must not have been held

1855.

FARNELL

v.

SMITH.

7 W. 4 &
1 Vict. c. 45,
s. 1.

Section 2.

1855.

FARNELL

v.

SMITH.

pursuant to a notice given on *two successive Sundays* preceding the day of meeting. The 37th section of the 59 G. 3, c. 134, seems to carry the matter a little further than the earlier sections: it enacts "that all the *powers and provisions* of the said recited act (58 G. 3, c. 45) or of this act, which authorise or relate to the grant, sale, conveyance, purchase, and resale of any lands, tenements, or hereditaments from or in the name of, or on behalf of, His Majesty, &c., to or by the said commissioners, for the purpose of building any additional churches or chapels, or the issuing, advancing, levying, or raising, or borrowing or taking up at interest, of any money for any such purpose, shall be, and are hereby declared to be, extended and be applicable in all respects, *mutatis mutandis*, for the grant, sale, conveyance, purchase, or re-sale of any lands, tenements, or hereditaments which may be necessary for enlarging any churchyard or burial-ground, or for making any new burial-ground and approaches thereto, *under the provisions of this act*, and for the issuing, advancing, levying, and raising, or borrowing and taking up at interest, of any money which may be required for any of those purposes, and for re-paying the same by instalments or otherwise, in like manner as if all such powers and provisions had been fully repeated and re-enacted in this act." Now, the word "provision" is more applicable to a notice than the word "power:" and one of the provisions in the 59 G. 3, c. 134, is that contained in s. 25, which enacts that it shall be lawful for the inhabitants in vestry assembled, "of which notice shall have been given *upon two successive Sundays* preceding the meeting of such vestry," to order and direct the making and raising of a rate, &c. The rating power, therefore, given by that section, is coupled with the requisition of a notice of the meeting given on two successive Sundays preceding. [*Cresswell*, J. Do you

say that the 58 G. 3, c. 45, is repealed?] No. [*Cresswell*, J. Do the powers given by that act continue?] Yes. [*Cresswell*, J. Is it not one of those powers, that money may be borrowed for the purpose in hand, by a majority of the inhabitants in vestry assembled, with the consent of two thirds of the proprietors of messuages, &c., within the parish?] That must, it is submitted, receive a qualified answer. The 59 G. 3, c. 134, is an amending act: the 24th and 25th sections, which give the amended powers, are coupled with a provision requiring a particular notice. If the second act is to be taken as a mere amendment of the first, the notice mentioned in s. 37 was necessary: if it is to be taken as conferring a new power altogether, possibly the two may co-exist. But the question is, whether the whole of these provisions are not to be read together as one power, having one common intent.

1855.

FARNELL
v.
SMITH.

Couch was not called upon to reply.

JERVIS, C. J. I think there is nothing at all in the objection. We are not much assisted by the case of *The Queen v. Abney*, where the point was not decided,—scarcely even raised. The simple question here is, whether a rate can lawfully be made in the manner adopted here. I think it can. The 59th section of the 58 G. 3, c. 45, enables the churchwardens, with the consent of the vestry and of the bishop and incumbent of the parish, to raise money for the purposes in the act mentioned, upon the credit of the rates, and to make rates for the payment of the interest and for providing a fund for repayment of the principal; and section 60 provided that this should only be done with the *consent* of the major part of the inhabitants in vestry, or four fifths of the select vestry, and of two thirds of the proprietors of the parish. By the 24th section of the 59 G.

1855.

FARNWELL
v.
SMITH.

3, c. 134, the *dissent* of one third of the proprietors is substituted for the *consent* of two thirds. And the 25th section authorises the major part of the inhabitants in vestry assembled (of which notice shall have been given on two Sundays preceding),—or two thirds of such of the persons exercising the powers of vestry in such parish, as shall be assembled at any meeting of which due notice shall have been given according to the mode of giving notices for the assembly of such persons,—to direct the making and raising of a rate, &c. Thus there are two modes of providing the additional accommodation, which are familiar to all persons acquainted with the proceedings of vestries, or with parish affairs,—one, by raising the necessary funds at once, to be repaid within a given time, with interest; the other, by levying rates, to be expended as they are collected. The former mode has been adopted here. The money was borrowed with the consent of the inhabitants in vestry assembled, and of the bishop and incumbent: and one third of the proprietors of the parish did not dissent; and due notice was given, in the usual way, of the vestry meeting at which the resolution to borrow the money was come to. In the other mode of proceeding, under the 25th section of the 59 G. 3, c. 134, by rate to be expended as collected, notice on the two successive Sundays preceding the meeting would be necessary. I think all has been done regularly here, and that the plaintiffs are entitled to the judgment of the court.

MAULE, J. Having heard only part of the argument, I will only say that I entirely concur in what has fallen from the Lord Chief Justice.

CRESSWELL, J. I am of the same opinion. But for the 59 G. 3, c. 134, there would have been no question in the case. I think that statute did not take away any of

the powers previously conferred by the 58 G. 3, c. 45, except to substitute the dissent of one third for the consent of two thirds of the proprietors of the parish. The 25th section provides a further mode of carrying into effect the object contemplated. But that has not been followed here.

1855.

FARNELL
v.
SMITH.

WILLIAMS, J., concurred.

Judgment for the plaintiffs.

MOFFATT v. ANDREW LAURIE and Another, Executors
of JOHN LAURIE, Deceased.

Jan. 29.

THE declaration stated that the said John Laurie (deceased) being possessed of certain land, and the plaintiff being an architect and surveyor, it was agreed between them that the plaintiff should lay out the said

The declaration stated, that A., being possessed of certain land, and the plaintiff being an architect and surveyor, it was agreed between

them that the plaintiff should lay out the said land for building purposes, viz. that he should make all the necessary surveys, plans, &c., and that the plaintiff undertook the whole of the above on the following conditions,—that he make A. no charge whatever for the above services, but that, in the event of any of the land being disposed of for building purposes, the plaintiff should be appointed the architect on A.'s behalf to see that the construction of the works was substantial, &c., and that parties building on the land should pay the plaintiff 1½ per cent. on the outlay, providing they did not employ the plaintiff as their architect; but that, in the event of A. or his executors wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, with the understanding that he or they remunerate the plaintiff for the time, trouble, and expenses he had been put to in making the said preparations. It then averred that the plaintiff made the necessary surveys, plans, &c., and incurred expenses therein; and that the said land was not, nor was any part thereof, disposed of for building purposes according to the said agreement, although a reasonable time for such disposal of the same had elapsed; and that, after the death of A., the defendants, as his executors, dispensed with the further services of the plaintiff in respect of the said contract, and wholly released and discharged him from any further performance of the same, and hindered and prevented themselves from disposing, and put it out of their power to dispose of the said land, or any part of it, for building purposes; and that thereupon there became and was due and payable to the plaintiff from the defendants, as executors, a large sum for his trouble in preparing the survey, plans, &c.

Held, that the declaration shewed no cause of action, inasmuch as the event on the happening of which alone the plaintiff was to be entitled to remuneration for his services, viz. the disposal of the land for building purposes, had not happened.

1855.

MOFFATT
v.
LAURIE.

land for building purposes, viz. that he should make all the necessary surveys, plot down all clumpy belts, trees, &c., and carefully lay out all roads, approaches, &c.; also plot down the various sites for villa residences, with the contents marked on the same; and would also prepare all requisite plans, drawings, bird's eye views, &c., so as to shew the estate to the greatest advantage; and the plaintiff undertook the whole of the above on the following conditions,—that he make the said John Laurie no charge whatever for the above services, but it was agreed between them, that, in the event of any of the land being disposed of for building purposes, the plaintiff should be appointed the architect on the said John Laurie's behalf, to see that the construction of the works was substantial, and the elevations architectural, so that the general spirit of the whole design would be fully carried out, and that parties building on the land should pay the plaintiff 1¼ per cent. on the outlay, providing they did not employ the plaintiff as their architect; but that, in the event of the said John Laurie or his executors wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, with the understanding that he or they remunerate the plaintiff for the time, trouble, and expenses he had been put to in making the said preparations: Averment, that the plaintiff did thereupon, and in pursuance of the said agreement, in a reasonable time then next following, lay out the said land for building purposes, and make all necessary surveys in that behalf, and plot down all clumpy belts, trees, &c., and carefully lay out all roads, approaches, &c., and also plot down the various sites for villa residences, with the contents marked on the same, and did prepare all requisite plans, drawings, bird's eye views, &c., so as to shew the said estate to the greatest advantage, and spent, was put to, and incurred, divers time, trouble, and expenses in and about the same: That the said

land was not, nor was any part thereof, disposed of for building purposes, according to the said agreement, although a reasonable time for such disposal of the same had elapsed, and, after the death of the said John Laurie, the defendants, as executors as aforesaid, did wish to dispense with, and did dispense with, the further services of the plaintiff in respect of the said contract, and wholly released, discharged, and exonerated him from any further performance of the same on the plaintiff's part, and hindered and prevented themselves from disposing, and put it out of their power to dispose of the said land, or any part of it, for building purposes: and thereupon there became and was due and payable to the plaintiff from the defendants, as executors as aforesaid, divers large sums of money, amounting, to wit, to 6000*l.*, for and in respect of the plaintiff's time, trouble, and expenses to which he was put in making the said preparations as aforesaid: and the plaintiff had done and performed all things necessary on his part to entitle him to payment of the said 6000*l.* by the defendants as executors as aforesaid; yet the defendants had not paid the same, or any part thereof.

The declaration also contained counts for money payable by John Laurie for work and labour, goods sold and delivered, money paid, and money found due upon an account stated; and also counts for money payable by the defendants as executors as aforesaid for work and labour done for the said John Laurie, and for money found due upon an account stated with the defendants as executors.

The defendants pleaded,—first, to the first count, that the said John Laurie did not agree with the plaintiff as in that count alleged,—secondly, to the first count, that they the defendants did not dispense with the further services of the plaintiff in respect of the said contract, nor did they wholly release, discharge, or exonerate him,

1855.

 MOFFATT
 v.
 LAURIE.

Pleas.

1855.

MOFFATT
v.
LAURIE.

as alleged,—thirdly, to the first count, that they did not hinder or prevent themselves from disposing, nor did they put it out of their power to dispose of the said lands, or any part thereof, for building purposes, as alleged,—fourthly, to the second, third, fourth, and fifth counts, never indebted, as alleged,—fifthly, as to the residue of the declaration, that they were never indebted, as alleged.

Demurrer.

The defendants also demurred generally to the first count, the grounds of demurrer stated in the margin being,—“that the first count discloses no sufficient cause of action, inasmuch as it shews no agreement on the part of the said John Laurie to pay for the preparation of the plans, &c., in the event of the said land not being disposed of for building purposes, but, on the contrary, that it shews an agreement on the part of the said John Laurie to pay for the preparation of the said plans, &c., only in the event of any of the land being disposed of for building purposes, and it is expressly averred that not any of the said land was disposed of for building purposes : Also for that it appears that the event in which alone the plaintiff was to be paid,—that is to say, the dispensing with his services as architect to the said John Laurie after the said land had been disposed of for building purposes,—has not occurred : Also for that it does not appear that the plaintiff was ever appointed architect to the said John Laurie at all : Also that it appears that the plaintiff agreed to make no charge for the preparation of the plans, &c., if the land was not disposed of for building purposes : Also that it does not appear that the said John Laurie ever became liable to pay the plaintiff for the preparation, &c. : Also for that the contract was personal with the said John Laurie, and is not such as would at law descend to the executors : And also that it does not appear that the defendants had as executors any power over the said land, either to dispose of

the same for building purposes, or otherwise." The plaintiff joined in demurrer.

1855.

MOFFATT
v.
LAURIE.

C. Wood, in support of the demurrer. The event upon which the defendant was to be called on to pay for the plans, viz. the land being disposed of for building purposes, never took place. [*Jervis*, C. J. It does not appear that the executors took the estate. I think we must hear the other side.]

Finlason, contra. In the absence of any allegation as to the nature of the estate, the court will intend nothing. *Thurseden v. The Executors of Warthen*, 2 Bulstr. 158, is precisely in point. In debt for non-performance of covenants, upon nil debet pleaded, a verdict was given for the plaintiff; and, upon motion in arrest of judgment, the facts appeared to be these:—"Warthen, being lord of the manor of Dale, did covenant for himself, his heirs, executors, administrators, and assigns, within seven years, upon request, to convey and settle upon the plaintiff a copyhold estate pro termino vitæ suæ secundum consuetudinem manerii; and this to be done upon request made by the plaintiff, the covenantee, to him, his heirs, executors, or assigns: the plaintiff shews that Warthen, the covenantor, died, and that he requested the defendants, the executors of Warthen, to perform this within the time, which they refused to do, unde actio accrevit; and by the covenant this was to be done infra unum mensem post rationabilem requisitionem. It was not shewed in the declaration what estate Warthen had in the manor. It was urged that here the request ought to have been made to the heir, and not unto the executor; for, it is not intended that the covenantor had but an estate for years in the manor, but rather a fee-simple, for that a general, and not a particular estate is to be intended to be in him, which is a fee-simple; and so the

1855.

MOFFATT
v.
LAURIE.

request here of necessity ought to have been made unto him who was to take the estate, and this was the heir, not the executor ; for, the executor could not do and perform this, and therefore the request here made unto him is not good, and so no breach of covenant, for that no particular estate is to be intended to be in Warthen, the lord, and the covenantor, unless that the same was specially shewed." Dodderidge, J., said : " He might here have an estate for years in the manor ; and the request was to be made to the executors." Croke, J., said : " If he had nothing in the land, the heir shall not be charged, but his executors only." Haughton, J. : " He might be seised in fee of the manor, and then the request ought not to be made to his executors, but to his heir : it doth not here appear what estate he had in the manor ; and *we are not to intend that he had one estate more than another* ; but, for the generalness here, it not appearing what estate he had in the manor (none being shewed), this makes the matter here the more doubtful." Dodderidge, J. : " If a man makes a feoffment in fee of his manor of Dale, upon condition, that, if he, his executors or assigns, do pay so much money, that then it shall be lawful for him to enter again." The court all agreed " that this is a personal matter, and the executor here is to render the money." Coke, C. J. " The request here made to the executors is good, because *the executors do represent the person of the testator as to the performance of covenants by him to be by covenant performed.*" The report goes on to say,—*" The whole court agreed herein clearly."* And Dodderidge, J., added : " It being generally undertaken, and no estate shewed, it shall here be intended that he had only an estate for years in the manor ; and, if he had no estate at all in the same, his executors are then bound to procure this to be done, according to the covenant of their testator, at their peril." [Jervis, C. J. There,

there was a covenant that the executors should do it upon request. That is the distinction. The executors are bound by the contract of their testator.] *Carter v. Fossett*, Palmer, 329, is an authority to shew that assumpsit will lie against executors upon a contract by the testator, upon good consideration. [*Maule*, J., referred to *Kingdon v. Nottle*, 1 M. & Selw. 355.] The declaration here distinctly alleges that the testator agreed, that, in the event of his, or his executors, wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, with the understanding that he or they should remunerate the plaintiff for the time, trouble, and expenses he had been put to in making the said preparations. And it contains an averment that the defendants, as executors, did dispense with the further services of the plaintiff in respect of the said contract, and discharged him from the further performance of the same, and hindered and prevented themselves from disposing, and put it out of their power to dispose of the said land, or any part of it, for building purposes. It may be that the defendants have sold the property, and obtained an advanced price for it by reason of the plaintiff's services in plotting and laying it out. [*Jervis*, C. J. The agreement is in substance this:—
 "If you will exercise your professional skill in plotting and laying out the land, in the event of any part of it being disposed of for building purposes, you shall be employed as architect to superintend the buildings. But, should I wish to dispense with your services,—that is, as architect, when the land is disposed of for building purposes,—I shall be at liberty to do so, on paying you a reasonable remuneration for the work already done." The plaintiff's services could not be dispensed with, before the time arrived at which they could be required. This seems to have been the same sort of speculative agreement we had to put a construction on in the case of

1855.

 MOFFATT
 v.
 LAURIE.

1855.

 MOFFATT
 v.
 LAURIE.

Moffatt v. Dickson, antè, Vol. XIII, p. 543.] There, the approval of the commissioners in lunacy, and of certain other persons, was made a condition precedent to the acceptance by the defendants of the plaintiff's plans and specifications. Here, however, he has carefully stipulated for payment at all events. [Maule, J. The plaintiff is to be paid in a given way, when the land is disposed of for building purposes. But there is no covenant that it shall be disposed of for building purposes, and none other. Jervis, C. J. Upon the whole declaration, I think we can see that the land has not been let for building purposes, and cannot be so, because the executors have sold it.] It may be that they have sold it for building purposes. [Williams, J. If you can make out that upon this record, you will recover. Cresswell, J. If the land has not been disposed of for building purposes, the provision for payment has not yet arisen.] The agreement provides for three events. [Jervis, C. J. No: it provides for one event, with three modes of payment.] It is difficult to suggest what words could have been stronger, to provide against a dismissal. [Jervis, C. J. According to your construction of the contract, the testator precluded himself from selling the land for any other than building purposes.] The declaration, it is submitted, discloses a sufficient cause of action without that clause. [Maule, J. You cannot strike out that clause, and say that the action can be maintained without it. Is the plaintiff to be paid for being dismissed, or for the services he has rendered? Cresswell, J. If you strike out that which you propose to strike out, all that remains, is, that the plaintiff agreed not to be paid at all.] *Moon v. The Guardians of the Witney Union*, 5 Scott, 1, 3 N. C. 814, is very like the present case. There, Kempthorne, an architect, retained by the defendants to prepare plans and a specification for the erection of a workhouse for a union of which the defendants were

guardians, employed the plaintiff, a surveyor, to make out the bill of quantities. An advertisement for tenders was prepared, referring the builders desirous of tendering to the office of the defendants' clerk for a view of the plans and specification. The instructions given to the defendants' clerk to shew to the builders, contained an intimation that the quantities were being taken out, and that the expense of taking them out was to be defrayed by the successful competitor. It was proved to be the custom for the architect to employ a surveyor to make out the bill of quantities, and for the successful competitor to pay his charge. A misunderstanding having arisen between the defendants and Kempthorne, another architect was employed; and, when Kempthorne sent in his bill, claiming 113*l.* for the plans and specifications, and 65*l.* as "the surveyor's charge for making out the quantities," the defendants paid him 80*l.*, which he received in satisfaction of *his* demand, nothing being said about the surveyor's charge. It was held, that, under the custom proved, the architect, Kempthorne, must be considered the defendants' agent in the employment of the surveyor, and consequently that the latter was entitled to sue the defendants for the value of his services,—the want of a successful competitor being occasioned by their act. [*Maule, J.* That case will not very materially aid us in the construction of the agreement in this case. *Williams, J.* The only possible ground upon which it could be contended that the defendants are liable here, is, that there is a sort of implied undertaking that the testator and his executors will not do any act to put it out of their power to let the plaintiff have the benefit of the contract.] It is submitted that there is such an implied undertaking apparent on the face of the declaration.

1855.

MOFFATT
v.
LAURIE.

JERVIS, C. J. I entertain no doubt whatever in this

1855.

MOFFATT
v.
LAURIE.

case. The defendants are entitled to judgment. The case of *Moon v. The Governors of the Witney Union* has no application at all to the present question. The circumstances of that case were these:—The guardians of the Witney Union were desirous of erecting a workhouse, and employed Kempthorne as their architect to prepare the plans and specification. Kempthorne, as their agent, employed Moon, a surveyor, to take out the quantities,—a course which was not only proved at the trial to have been usual, but also to have been recognised and sanctioned by the defendants; for, when they advertised for tenders, they stated that the quantities were being taken out, and that the expense of so doing would have to be defrayed by the successful competitor. Some misunderstanding arising between the defendants and Kempthorne, they declined to go on with the contract; therefore there was no successful competitor, and the defendants remained liable to the surveyor. Here, the contract provides that the plaintiff shall make no charge whatever for surveying and plotting the land; but, that, in the event of any of the land being disposed of for building purposes, the plaintiff should be appointed the architect on Laurie's behalf, and that parties building on the land should pay the plaintiff $1\frac{1}{4}$ per cent. on the outlay, provided they did not employ him as their architect: and then the agreement goes on to provide, that, in the event of Laurie or his executors wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, paying him for the trouble and expense he had been put to in making the preparations. So far the agreement seems to be perfectly plain. If Laurie prevents the plaintiff from earning his remuneration in the shape of commission as architect, he is to pay him for his labour in surveying and plotting, &c. A momentary apparent difficulty was presented by my Brother

Williams's suggestion that possibly there might be an implied undertaking on the part of Laurie that he would do no act to put it out of his or his executors' power so to deal with the property as to prevent the plaintiff from obtaining the anticipated commission. But there is nothing on the face of the agreement to raise any such implied undertaking. For anything that appears, the plaintiff may have gone to Laurie, and suggested to him that he could so attractively plot out the land that it would readily let for building purposes, and that he was so sanguine as to the success of the scheme, that he was content to rest his chance of remuneration upon it. There is nothing on the face of the contract to restrain Laurie from disposing of the land for any other than building purposes. As, therefore, the land was not let for building purposes, and there were no services of the plaintiff's which could be dispensed with, the event has not arisen upon which he was to be entitled to claim a remuneration for his trouble and expense in plotting the land. I therefore think the defendant is entitled to the judgment of the court upon this demurrer.

1855.

MOFFATT
v.
LAURIE.

MAULE, J. I am of the same opinion. The contract here is not very unlike that in *Moffatt v. Dickson*, where we held, after much argument, that the plaintiff had thought fit to stipulate, that, in certain events, he was to receive no remuneration at all for his labour. Generally speaking, people who do work for others expect to be paid for it; as in the case cited, of a surveyor who is employed in taking out what are called quantities. But, where the work to be done is of the peculiar character of the work in the present case, which may entail great expense upon the owner of the land,—an expense he would hesitate to incur upon a speculation of the probable result of which he might not be very sanguine,—it may well be that an architect of experience like the

1855.

MOFFATT
v.
LAURIE.

plaintiff, feeling certain that he can lay out the ground in a manner so attractive as to render the success of the venture matter of little or no doubt, may be content to agree that his remuneration for the trouble he bestows upon it shall be limited to the per-centage on the outlay when his plans shall be carried into effect by the erection of houses upon the land. In one event, and in one event only, viz. of Laurie or his executors wishing to dispense with the plaintiff's services, that is, as architect, the agreement provides that they shall be at liberty to do so only upon the understanding that he shall in that case be remunerated for the time, trouble, and expense, incurred by him in preparing the plans. There is no provision that he shall be paid for the plans at all events: and no event has occurred in which the agreement gives him any title to claim remuneration. It is urged that the defendants, Laurie's executors, are responsible because they have by parting with the land put it out of their power to dispose of it for building purposes. That, however, is an event which the agreement has provided for, and in which the plaintiff is to receive nothing. The exceptional case of the plaintiff being entitled to remuneration for his labour in preparing the plans, if his services are dispensed with, applies only to the event of a right having accrued to him to be paid for his services, viz. if the land is let for building purposes. That case has not arisen. I further think, that, as the declaration does not allege that the defendants wrongfully dismissed or dispensed with the services of the plaintiff, or by any wrongful act on their part made it impossible to prosecute the building scheme, and thereby deprived the plaintiff of the profits he ought to have acquired, it is bad; though I do not think it would have very much bettered the plaintiff's position if it had contained such an allegation. For these reasons, I concur in thinking that the defendants are entitled to judgment.

CRESSWELL, J. I am entirely of the same opinion. The earlier part of the declaration merely alleges that Laurie being possessed of certain land, and the plaintiff being an architect and surveyor, it was agreed between them that the plaintiff should lay out the said land for building purposes, making the necessary surveys and plans, and that the plaintiff undertook the whole of the above on certain conditions, one of which was, that he should make no charge whatever for the above service. I find there no stipulation that Laurie shall offer or continue for any specified time to offer the land for building purposes. The declaration then goes on to allege, that, in certain events, the plaintiff shall be paid for his services in a particular way. That event must arise before any right to receive payment can accrue at all. In the event of any of the land being disposed of for building purposes, the plaintiff is to be appointed the architect on Laurie's behalf; and the parties building on the land are to pay him 1½ per cent. on the outlay if they do not employ him as their architect: but, in the event of Laurie, or his executors, at any time wishing to dispense with the plaintiff's services, they are to be at liberty to do so, but in that case they are to pay him for his time and trouble in preparing the plans, &c. Neither of these events has happened. The land has not been disposed of for building purposes, so as to render the services of an architect necessary. I therefore think the plaintiff has not made out any cause of action.

WILLIAMS, J. I am of the same opinion. It is clear from the terms of the contract as set out in the declaration, that the plaintiff stipulated to do the work for which he seeks to be compensated in this action, gratis, unless an event should happen which has not happened, viz. that the land should be let for building purposes. I entertained some doubt during the course of the argu-

1855.

 MOFFATT
 v.
 LAURIE.

1855.

MOFFATT
v.
LAURIE.

ment, whether a contract might not be implied on the part of Laurie and his executors that they would do no act to prevent the occurrence of the event on which the plaintiff's remuneration was made to depend. That might have given rise to a point of considerable difficulty: it might have been the duty of the defendants as executors to sell the land for the purpose of satisfying debts of a higher degree: and it would be difficult to say that they would be liable in damages for dealing with the estate of their testator in a manner in which they were by law bound to deal with it. But there is another difficulty in the plaintiff's way: the declaration is not framed so as to entitle the plaintiff to claim damages from the defendants for preventing him from acquiring the profit he is entitled to under the contract; but the plaintiff seeks to recover damages for improperly dispensing with his services. But, upon consideration, I think none of these points arise. The plaintiff agreed to prepare the plans gratis, and not to look to Laurie or his executors for any remuneration unless certain events should happen which have not happened. If Laurie, or his executors, thought fit to change their minds as to the disposal of the property, I see nothing in the contract set out in the declaration to prevent them from so doing, or to give the plaintiff any right to damages in the event of their doing so.

Judgment for the defendant.

1855.

CANHAM v. BARRY.

Jan. 29.

THE first count of the declaration stated, that, on the 13th of June, 1854, a certain agreement or instrument in writing was made and signed by and between the plaintiff and the defendant under and with their respective signatures of "George Canham," and "Robert Thomas Barry," in the words and figures following, that is to say,—“I agree to purchase of Robert Thomas Barry all his unexpired term and leasehold interest in the farm now in his occupation, at West Thurroch, in the county of Essex, together with all the growing crops now thereon, and also all the horses and implements of husbandry set out in the schedule hereunder written, at and for the price and sum of 3600*l.*, and I have this day paid the sum of 1000*l.* in part payment thereof, and to pay the balance thereof in manner following, that is to say, first by a bill of acceptance to become due on the 11th of November now next for the sum of 1000*l.*, to be the joint and several acceptance of me the undersigned George Canham, and of James M'Gibbon Main, and by one other subsequently due acceptance for the sum of 1600*l.*, to become due on the 15th of May now next, and to be also the joint and several acceptance of me the under-

Where a plaintiff declares upon an agreement *in writing*, the defendant cannot in pleading rely upon *oral* matter introducing a qualification of the contract declared on, or shewing that it was made subject to conditions which do not appear upon the face of it.

To a count upon an agreement whereby the defendant agreed upon certain terms to sell to the plaintiff "all his unexpired term and leasehold interest in a farm then in his occupation," with immediate possession,—the defendant pleaded, that he held the farm under a lease containing a

covenant not to assign without the consent in writing of the lessors; that, being desirous to part with the farm, he applied to the agent of the lessors for their consent to his doing so, and had obtained an assurance, that, if he found an eligible tenant, who could give satisfactory references, the consent would not be withheld; that the agreement was made for the purpose of one Main becoming the occupier of the farm; and that the defendant was induced by the plaintiff to enter into the agreement, and did so, upon the faith and assurance, as the plaintiff knew, and the plaintiff, in order to induce the defendant to enter into the agreement, represented, and induced the defendant to believe, that Main was a person of respectability, and eligible as tenant of the farm, and could give references that would be satisfactory to the landlords; whereas, in truth, he was not a person of respectability, and could not and did not give such references:—Held, a good plea, inasmuch as it shewed that the defendant was induced to enter into the contract by a false representation of the plaintiff as to a fact within his knowledge, and which was material to the subject-matter of the contract.

1855.
CANHAM
v.
BARRY.

signed George Canham and of James M'Gibbon Main: possession of the said farm and growing crops to be given to me immediately on the delivery of such bills of acceptance to the said Robert Thomas Barry: he undertaking to pay all the rent and outgoings up to Michaelmas Day next; but that the said Robert Thomas Barry shall not be called upon to furnish any further or other title than the lease he now holds from the late John Freman of the said farm. Dated the 13th of June, 1854. George Canham." "We, the undersigned, consent, to the extent of our interest concerned therein, to the agreement within written. James M. Main. Robert Thomas Barry:" That, the said agreement or instrument having been so made and signed as aforesaid, the plaintiff, in pursuance thereof, paid to the defendant the said sum of 1000*l.* therein first specified, and paid the balance of the said sum of 3600*l.* in the manner agreed upon, and delivered to the defendant two negotiable instruments in writing whereby respectively the plaintiff and the said James M'Gibbon Main became jointly and severally liable to pay to the defendant or his order the sum of 1000*l.* in the said agreement or instrument secondly specified, on, to wit, the 11th of November, 1854, and the sum of 1600*l.* on, to wit, the 15th of May, 1855, which negotiable instruments the defendant accepted and took for and on account of the said balance of the said sum of 3600*l.*; and the plaintiff was thereupon and then, and has since been, ready and willing to accept and enter into possession of the said farm and growing crops, of which the defendant had notice, and was requested to perform the agreement on his part; and the plaintiff had done all things necessary, and everything had occurred, to entitle him to have possession of the said farm and growing crops, &c, and did not call for any further or other title than was agreed upon; yet the defendant did not nor would give posses-

sion of the said farm and growing crops, or either of them, in pursuance of the said agreement, but therein failed and made default; and although the plaintiff was ready and willing to accept the said horses and implements of husbandry (a) (of which the defendant had notice), and a reasonable time for the delivery of the same to the plaintiff elapsed before this suit; yet the defendant did not nor would deliver the same, or any part thereof, to the plaintiff, but therein made default: And that, by reason of the premises, the plaintiff had been wholly deprived of the said sum of 1000*l.* so paid to the defendant as aforesaid, and of the interest he otherwise might and would have made of and by the same, and lost and was deprived of great gains and profits which would have accrued to him if the defendant had performed the agreement on his part, and was put to and incurred liability to pay heavy expenses in and about the endeavouring to procure the performance of the said agreement by the defendant, and certain moneys, to wit, 50*l.*, which the plaintiff paid and became liable to pay to a certain person whom he engaged to become and act as his superintendent in and over the said farm, became wholly lost and wasted to the plaintiff, and certain other moneys, to wit, 200*l.*, which the plaintiff laid out and expended in and upon the purchase of furniture suitable for a certain dwelling-house in and upon and parcel of the said farm, and of which possession should and was to have been given together with the said farm, became wholly lost to the plaintiff.

Sixth plea, to the first count,—that the indenture therein mentioned was an indenture of lease for a term of years of which, at the time of the making of the agreement set forth in that count, divers, to wit, four years were unexpired; and that the defendant did in

1855.

 CANHAM
 v.
 BARRY.

(a) Mentioned in a schedule annexed to the agreement.

1855.

CANHAM
v.
BARRY.



such lease covenant with John Freman therein named (the lessor of the said lease) that he the defendant would not during the term thereby granted, give, grant, demise, assign, transfer, underlet, or part with in any manner howsoever the said indenture of lease, or the said messuages, tenements, lands, and premises thereby demised, or any part or parts thereof, except only the messuage or tenement called the Stone House, and certain cottages therein respectively mentioned, and being part of the demised premises, or his estate, term, or interest therein, or in any part of the same, to any person or persons whomsoever, for all or any part of the said term, without the special licence and consent in writing of the said John Freman, his heirs or assigns, for that purpose first had and obtained: and by the said lease, it was provided, that, if the defendant should at any time during the term give, grant, demise, assign, transfer, or otherwise part with the said indenture of lease, or the premises thereby demised, or any part or parts thereof, except as aforesaid, or his estate, term, or interest therein, or in any part of the same, to any person or persons whomsoever, for all or any part of the said term, without the licence and consent in writing of the said John Freman, his heirs or assigns, first had and obtained, it should and might be lawful to and for the said John Freman, his heirs or assigns, into and upon the said messuages or tenements, lands and premises, or any part thereof in the name of the whole, wholly to re-enter, and the same to have again, possess, and enjoy, as in his and their former estate and right, and the defendant and all other the occupiers of the said demised premises thereout and from thence utterly to expel, put out, and amove: That, before and at the time of the making of the said agreement, he the defendant was desirous of parting with the possession of the said demised premises, and that he had, before the making of such agreement, accordingly ap-

plied to the agent of the landlords of the said demised premises under the said lease, to wit, one Henry De Grey Warter, for permission to part with such possession: That, before the making of the said agreement, the said Henry De Grey Warter had, in answer to such application, stated in writing to the defendant, that, if he the defendant could find a successor eligible as tenant of the said demised premises in the opinion of the landlords thereof, after they had had an opportunity of inquiring, and a reference to sureties or bankers, as might be considered necessary, there would be no obstacle to their complying with the defendant's wishes, —whereof the plaintiff, before the making of the said agreement, had notice: That the said agreement was made with a view and for the purpose of the said James M'Gibbon Main becoming the occupier and taking possession of the farm therein mentioned, and of his taking to the said crops, horses, and implements, and therewith carrying on and cultivating the said farm for and during the residue of the said term; and that he the defendant was induced by the plaintiff and the said James M'Gibbon Main to enter into the said agreement, and did so, upon the full faith, assurance, and belief, as the plaintiff knew, and the plaintiff, in order to induce the defendant to enter into the said agreement, represented to, and caused, procured, and induced the defendant to believe, and the defendant then did believe, as the plaintiff also well knew, that the said James M'Gibbon Main was a person of respectability, and eligible as tenant and occupier of the said farm, and could give references as to his character that would be satisfactory to the landlords of the said farm; whereas in truth and in fact he was not a person of respectability, and was not eligible as a tenant and occupier as aforesaid, and could not and did not give references as to his character satisfactory to the said landlords of the said farm, as the plaintiff before

1855.

 CANHAM
 v.
 BARNY.

1855.

CANHAM
v.
BARRY.

and at the time of the making of the said agreement well knew, though the defendant was then ignorant thereof, as the plaintiff also then well knew: That the plaintiff did not at any time disclose such circumstances as aforesaid relating to the said James M'Gibbon Main, but wholly concealed them from the defendant; And that the defendant afterwards discovered such circumstances, and thereupon, and thence hitherto, he the defendant hath [been] and still is ready and willing to return to the plaintiff the said sum of 1000*l.* so paid by the plaintiff as aforesaid, and the said promissory notes, whereof the plaintiff then, and before suit, had notice; whereby the said agreement was and is void.

Demurrer
thereto.

The plaintiff demurred to the sixth plea, the ground of demurrer stated in the margin being,—“that the plea does not sufficiently excuse or justify the breach of agreement to which it is pleaded, and which it admits, or shew that the agreement was obtained by fraud, or by any false representation that is or was material so far as relates to the cause of action in the first count relied on.”

Seventh plea.

The defendant also pleaded, seventhly, to the same count, that the said lease contained such covenant and proviso as in the last preceding plea mentioned; and that, before the making of the said agreement, he the defendant was desirous of parting with the possession of the said demised premises; and that he had applied to the agent of the landlords, who had, in answer to such application, made such statement in writing; and that the plaintiff had notice in all respects, as in the said last preceding plea was mentioned; and that the said agreement in the first count mentioned was made with a view and for the purpose of the said James M'Gibbon Main's becoming the occupier and taking possession of the farm therein mentioned: That the said James M'Gibbon Main was a party to the said agreement; and that such agreement was made and entered into *on the condition,*

*and subject to the terms, that the said James M'Gibbon Main should give to the landlords of the said demised premises, or their agent in that behalf, satisfactory references as to his character, so as to give a reasonable opportunity to them of inquiring as to the said James M'Gibbon Main's being eligible as a successor to the defendant in the occupation of the demised premises, and that the said James M'Gibbon Main would thereby, or by means thereof, satisfy the landlords, or their agent, that the said James M'Gibbon Main would be eligible as aforesaid: That the said landlords would not, as he the plaintiff and the said James M'Gibbon Main at the time of the making of the said agreement well knew, permit the defendant to transfer or in any way to part with the said term or interest in the said farm, unless they proved to be so eligible as aforesaid; and that the plaintiff and the said James M'Gibbon Main accordingly gave certain references to the said Henry De Grey Warter, as such agent, for the purpose in that behalf as aforesaid, and none other: That the said references were not satisfactory to the said landlords or their agent as to the character of the said James M'Gibbon Main, and did not afford a reasonable opportunity to the said landlords or their agent of inquiring as aforesaid; and that the said James M'Gibbon Main did not thereby, or by means thereof, satisfy the said landlords or their agent that the said James M'Gibbon Main would be eligible as aforesaid: And that, by reason of the premises in this plea aforesaid, the said landlords would not grant any such consent or licence as aforesaid, and would not suffer the defendant to part with possession of the said demised premises, or any part thereof; and that thereupon, and thence hitherto, he the defendant hath been and still is ready and willing to return to the plaintiff the said sum of 1000*l.* so paid by the plaintiff as aforesaid, and the said promissory notes,—whereof the plain-*

1855.

 CANHAM
 v.
 BARRY.

1855.
 CANHAM
 v.
 BARRY.
 Demurrer
 thereto.

tiff then and before the suit had notice; whereby the said agreement was and is void.

To this plea also the plaintiff demurred, the ground of demurrer stated in the margin being,—“that the plea does not sufficiently excuse or justify the breach of agreement in the first count declared upon, which is admitted by the plea; that it does not shew that the agreement is avoided by any fraud or mala fides on the plaintiff's part; that it is sought by the plea to alter, qualify, and control the agreement which is set out in hæc verba in the first count, by parol matter, or by matter not stated to be in writing, or to be incorporated with, or contained in, or forming part of, the agreement; and that it is not shewn that the non-compliance with the supposed terms or conditions is material, or that the terms or conditions alter or take away the plaintiff's right of action in respect of the breach in the first count relied upon.” Joinder.

Phipson, in support of the demurrer. (a) The two pleas are equally bad. The sixth is a rambling plea

(a) The points marked for argument on the part of the plaintiff, were as follows:—

“That the sixth plea is bad in substance for one or more of the following reasons,—that it does not shew that the plaintiff had notice of the fact that the lease under which the defendant held the farm contained the covenant or proviso set out in the sixth plea; and that, if notice thereof be in substance alleged, the plea does not shew that, or how, the plaintiff's right of action is affected or qualified thereby:

“That the sixth plea does not shew that the agreement, a

breach of which is alleged in the first count, is avoided by any fraud, mala fides, or false representation of the plaintiff; that the false representation relied upon, were it ever made, was made with respect to a person who is no party to the agreement, and to matter wholly immaterial to the question in dispute:

“That, to make the plea good, it ought to have shewn, that, by the agreement, Main was to take possession of the farm; that, by the agreement, the landlord's acquiescence or consent was to be obtained before the giving of possession

which may be assumed to be a plea intending to set up that the agreement declared on was obtained by fraud. Now, the agreement simply is, that the defendant shall give the plaintiff possession of the farm and farming implements, on the plaintiff's doing certain things, viz. paying 1000*l.*, and giving certain bills. The defendant by his sixth plea seeks to introduce an exception, founded on certain supposed fraudulent statements made by the plaintiff at the time of entering into the agreement, that Main, the proposed occupier of the farm, was a solvent person and eligible as a tenant. The agreement, however, was, that the *plaintiff* should have possession of the farm: there was no contract that Main should be the occupier. The fraud, if any, is altogether collateral. There was no binding agreement on the plaintiff's part to let in Main; all that is suggested, is, that, at the time of making the agreement, the plaintiff represented that Main was to be the tenant. Nor is it averred that the plaintiff had any notice that the defendant was under covenant with his landlords not to assign or underlet without their consent. The defendant has received the 1000*l.* and the bills: he avers that he is willing to return them; but non constat that the bills may not now be

1855.

 CANHAM
 v.
 BARRY.

could be insisted upon by the plaintiff; and that the misrepresentation relied upon was of such a nature as to justify or excuse the not giving possession to the plaintiff, which is the breach relied upon:

"And that the plea is no answer to so much of the first count whereby the plaintiff seeks to recover damages for the non-delivery of the horses and implements in the schedule to the agreement mentioned:

"Upon the argument of the demurrer to the seventh plea,

the plaintiff will contend that the plea is bad for some or one of the reasons above assigned with respect to the sixth plea; and more especially that it seeks to import into the written agreement set out in *hæc verba* in the first count, terms, conditions, and parties that do not appear on the face of it, thereby altering, qualifying, and controlling the terms of it by parol matter, or by matter which is not stated to be in writing, or does not appear on the face of it."

1855.

CANHAM
v.
BARRY.

outstanding in the hands of third persons. This is not that kind of fraud which will vitiate an agreement: it is misrepresentation as to a mere collateral matter. This is exemplified in the recent case of *Feret v. Hill*, antè, p. 207. There, A. procured B. to grant him a lease of premises, by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, A. converted the premises into a common brothel, whereupon B. forcibly expelled him. And this court held, that A. might maintain ejectment,—the fraudulent misrepresentation, and the subsequent illegal use of the premises, not being sufficient (at law) to avoid the lease. *Mason v. Ditchbourne*, 1 M. & Rob. 460, which was cited on the argument of that case, is, notwithstanding what is stated in 2 C. M. & R. 720 (a) to have afterwards occurred there, is, so far as it goes, an authority to the same effect. There are numerous cases where parol evidence has been held not receivable to control written contracts. *Smart v. Hyde*, 8 M. & W. 723, which may be cited for the contrary, was the case of a parol sale of a horse, with a warranty; and all the court decided, was, that a plea setting up the new matter was not bad as amounting to the general issue. [*Maule, J.* Is there any difference in this respect between a parol contract and a contract under seal?] In *Foster v. Jolly*, 1 C. M. & R. 703, 5 Tyrwh. 239, it was held, that, where a note is made payable fourteen days after date, parol evidence cannot be given to shew that it was not to be paid in case a verdict was obtained in an action brought between other parties: and Alderson, B., said: "Such evidence falls within the general rule, that matters in writing shall not be contradicted by parol." [*Maule, J.* In the present case, the contract, to be valid, must be in writing.] No doubt. In *Adams v. Wordley*, 1 M. & W. 374, the plaintiff declared as drawer against the ac-

ceptor of two bills of exchange, payable respectively six and twelve months after date. The plea set forth an agreement,—not stated to be in writing, and in that respect like the agreement sought to be substituted here,—between the plaintiff and the defendant, by which, before the making of the bills, it was agreed that the defendant should be discharged from all liability in an action commenced against him by the plaintiff on a promissory note, on his paying the plaintiff the costs of such action, and a certain sum of money, and accepting the bills of exchange in question,—in case the plaintiff should recover in another action brought by him against another party on a promissory note given under similar circumstances to the defendant's; and that, until he should so recover, or if he should not recover, he should not call for payment of the bills of exchange: and the plea averred, that the defendant accordingly paid the costs and money agreed for, and accepted the bills of exchange in question, and that the action against such third party was still undetermined: and it was held, on demurrer, that the plea was bad, inasmuch as the defendant could not vary the absolute contract entered into by the bills of exchange, by a contemporaneous oral contract inconsistent with it. In *Webb v. Spicer*, 13 Q. B. 886, to assumpsit on a promissory note made payable by the defendant to the plaintiffs, as executors of S., on demand, with interest, the defendant pleaded, that, at the same time as the making of the note, an agreement in writing was made, between the defendant and other persons and the plaintiffs, that the note should not become due and payable until one E. attained the age of twenty-five years: or, if he should die under that age, then upon certain moneys becoming divisible under the will of S.; and that E. was still living, and under twenty-five. Issue was joined upon a replication traversing the agreement. It appeared on the trial, that

1855.

 CANHAM
 v.
 BARRY.

1855.

CANHAM
v.
BARRY.

S., by her will, had bequeathed half of her residuary personal estate to her daughter, the defendant's wife, and had directed the plaintiffs, as her executors, to place out at interest the remaining half, until E., one of her three grandsons, should attain the age of twenty-five. After the death of the testatrix, the plaintiffs paid over half the residue to the defendant; and, E. being then under twenty-five, the plaintiffs invested the remaining half of the residue in promissory notes payable on demand, and bearing interest, one of such notes being the note mentioned in the declaration. At the time of making this note, an indenture, to which the defendant, the grandsons, and the plaintiffs were parties, was executed by all the parties thereto except the plaintiffs. The indenture, after reciting the will and death of the testatrix, and the payment of half the residue to the defendant, recited that the grandsons had requested the plaintiffs to invest the remaining half of the residue upon the security set forth in the schedule to the deed, "until the same" would "be divisible under the trusts of the said will; which they" had "agreed to do upon" the grandsons executing the indenture, "in order to indemnify" the plaintiffs "against any loss or diminution that" might "happen to the said trust estate and moneys, or interest or income thereof, by the failure of the said securities;" and there was a covenant by the grandsons, in consideration of the premises, to indemnify the plaintiffs accordingly; and a further covenant by the two other grandsons, that E., who was then a minor, should execute the indenture on attaining his majority. The security referred to, as set forth in the schedule, consisted of the promissory note in the declaration, and other notes payable also on demand, with interest. The plaintiffs were present at the execution of the deed, assented to it, and acted upon it. A verdict was found for the defendant. It was held by the court of Queen's Bench

that the plaintiffs were bound by the indenture, the meaning of which was that the securities mentioned in the schedule should remain outstanding until E. attained twenty-five; and that the plea was proved. The case afterwards came before the court of error and it was held that the agreement in the indenture was collateral to the agreement in the declaration, because, though stated to be contemporaneous, it was not stated to be parcel of it, and was not between the same parties: that, as a collateral agreement, it was invalid for want of consideration, and was no defence, being at most a covenant not to sue for a limited time, and also a covenant with other covenantees than the defendant alone; and that the plea was bad, and the plaintiffs entitled to judgment, notwithstanding the verdict. And that judgment was affirmed on error in the House of Lords. In *Geddes v. Pennington*, 5 Dow, 159, a parol representation, at the time of the sale of a horse (with a written warranty), that the horse had been sent to the seller to be sold, by a gentleman from England, was not (though proved to be false) such a representation as would avoid the sale. Upon these grounds, it is submitted that both these pleas are bad.

1855.

 CANHAM
v.
BARRY.

Bovill, contrà. (a) It appears upon the record, that

(a) The points marked for argument on the part of the defendant were as follows:—

“That the sixth plea shews that the contract declared upon was obtained under such fraudulent representations and circumstances as to avoid it:

“That the seventh plea shews that the contract was subject to terms not disclosed by the declaration, and that, having regard to such terms, and the facts stated in the

plea, and admitted by the demurrer, the defendant was justified in declining to carry out his agreement; that, in the absence of all statement to the contrary, it must, on general demurrer, be assumed that such terms were in writing, and contemporaneous with the contract set out in the declaration; and that the plea is at all events good as a denial of the contract declared upon:

“That it sufficiently appears

1855.

CANHAM

v.

BARRY.

the defendant holds a farm under a lease containing a covenant not to assign or underlet without the consent of the landlords, and a proviso for re-entry in case of breach; that a negotiation for an assignment of his term takes place between him and plaintiff, and the defendant applies to his landlords for permission to assign the lease, and their agent assents thereto on their behalf, on condition that an eligible tenant is found; and that the plaintiff, having notice of this state of things, makes a false representation as to the character and circumstances of Main, the proposed tenant (who seems to have had some interest the extent of which is not stated), and thereby induces the defendant to enter into the agreement declared on. [*Jervis*, C. J. Does the plea allege that the landlords object or ever did object to Main?] It is not necessary that it should. [*Maule*, J. It is not enough for you to say that the plea is consistent with a state of things which will make it a good plea: you must say the converse.] The defendant entered into the agreement upon the full faith and assurance that Main was a responsible person: this representation being false, and false to the knowledge of the plaintiff, the whole foundation of the agreement fails. In *Mason v.*

upon the plea that such terms were material, and the compliance therewith by the plaintiff and Main conditions precedent to the plaintiff's right to call for a fulfilment of the agreement:

"That, inasmuch as the defendant was to make out a title under the lease mentioned in the pleadings, and it nowhere appears that the plaintiff has waived his right to have such title, the plea is good, as shewing that the defendant could

not make out such title, and that the plaintiff has misconceived his cause of action, if any, which, if he has any, is, for not making out a title, rather than that set forth in the declaration:

"And that, under the circumstances appearing on the record the plaintiff was not bound to give possession, unless he could make out the title required by the agreement before mentioned."

Ditchbourne, 1 M. & Rob. 460, where, to an action upon a bond given by the defendants for payment of money for the purchase of the business of the plaintiff's testator, who had been an attorney, the defendants pleaded that the bond was obtained by the fraud and covin of the testator; and Lord Abinger refused to allow them to give evidence to shew that the bond had been obtained from them by a fraudulent misrepresentation of the extent and nature of the business which they were contracting to buy of the testator: but the court afterwards granted a new trial, which was moved for on the ground that this evidence had been improperly excluded. [*Maule*, J. I once entertained something of the same view as Lord Abinger did. But, of late years, the constant practice has been to plead to an action upon a contract, that the defendant was induced to enter into it by the fraud and covin of the plaintiff.] In *Feret v. Hill*, which is relied on for the plaintiff, one of the representations was that of a third person,—like that in *Cornfoot v. Fowke*, 6 M. & W. 368. It is true, there was also a statement by the party himself as to the manner in which he *intended* to occupy the house: but that is very different from the fraudulent misrepresentation of a fact which the plaintiff knows to be false. *Feret v. Hill* does not go to the length of deciding,—nor does any case so decide,—that an agreement cannot be avoided on the ground of fraud. [*Maule*, J. The ground of that decision was this:—It was an agreement to confer an interest in a house. The defendant was induced to enter into the contract by a false representation, which clearly would have excused him from performing it: but, the agreement having been executed, and the plaintiff let in under it, and an interest in the premises having thereby become vested in him, the court thought it was not divested by the antecedent fraud. That may be right, or it may be wrong; but it does appear to me to have

1855.

 CANHAM
v.
HARRY.

1855.

CANHAM
v.
BARRY.

a colour of legality about it.] That case does not at all press : neither does *Geddes v. Pennington*, 5 Dow, 159 ; though it may be observed that the passage for which it was cited was unnecessary to the decision of the case, and does not profess to lay down any principle of law. [*Cresswell*, J. Suppose a man sells you a horse for 150 guineas, with or without a warranty, telling you that he himself had given 100 guineas for it at a fair, and you afterwards discover that that statement is untrue,—could you therefore rescind the contract?] Certainly not. In *Evans v. Edmonds*, antè, Vol. XIII, p. 777, the court held a deed to be avoided by a contemporaneous fraudulent representation and concealment. [*Cresswell*, J. That was a very peculiar case.] Policies of assurance are constantly avoided on the ground of fraudulent representations, or the fraudulent suppression or concealment of facts which ought to be disclosed. There is no authority to be found against the validity of the sixth plea. The defence relied on, is, that the defendant was induced to enter into the agreement by means of the fraudulent representation by the plaintiff of a fact which was false, and false to the plaintiff's knowledge, relating to the subject-matter of the contract, and made in a matter which was calculated, and which the plaintiff at the time of making it knew to be calculated, to impose upon the defendant a serious responsibility. Such a representation can hardly, it is submitted, be called collateral to the contract.

Seventh plea.

The seventh plea also affords a good answer. It is not unusual for a plaintiff to set out in his declaration just so much of the contract as he relies on ; and then the defendant in his plea sets out any matter of condition or qualification which he relies on as disentitling the plaintiff to recover. This is in substance a plea of that sort. It is quite consistent with the statement in the declaration, that the agreement between

the parties did not consist simply of the two papers set out, but that it was subject to such a condition as mentioned in the seventh plea. It may be conceded that a parol term cannot be added to a written contract: but it is at all times competent to a defendant to shew that the document set out is not the contract, or that it constitutes no contract at all. A written proposal may be assented to by parol. [*Cresswell*, J. Here, the agreement is said to have been signed by both parties. If your argument were to prevail, the terms of a written contract might in all cases be varied by parol.] The papers were signed subject to a condition that the plaintiff should satisfy the landlords of Main's eligibility as a tenant, and that Main become a party to the agreement. The law knows no distinction between written contracts not under seal and oral contracts. "The law makes no distinction," says Lord Abinger, C. B., in *Beckham v. Drake*, 9 M. & W. 92, "in contracts, except between contracts which are and contracts which are not under seal. I recollect one of the most learned judges who ever sat upon this or any other bench, being very angry when a distinction was attempted to be taken between parol and written contracts, and saying 'they are all parol unless under seal.' If they are written, they may indeed require to be stamped; but it is the act of parliament which makes that distinction; the common law makes none. A contract under seal can bind none but those who sign and seal it. A contract not under seal is open to all the common-law requirements and incidents of a contract, whether in writing or not." The question is, whether this plea does not in substance say that the two papers set out in the declaration did not constitute the agreement, because they were signed (or the agreement entered into) on condition that Main should give satisfactory references. The condition upon which the agreement was made, was, in effect, part of its

1855.

CANHAM
v.
BARRY.

1855.

CANHAM
v.
BAREY.

terms. [*Maule*, J. The plea in substance means this, —that the defendant did not enter into the agreement mentioned in the declaration, but into another, differing in the circumstance of its being conditional.] If necessary, it may on this plea be assumed that the condition was also in writing.

Reply.

Phipson, in reply. If the argument on the other side, as to the seventh plea, be right, it would always be open to a defendant to contend, that, whatever the terms of the agreement declared on, it is subject to some condition which does not appear upon the face of it. [*Maule*, J. Being demurred to, the meaning of the plea is, that the agreement declared on is not really the whole agreement between the parties, but that the agreement was in fact made subject to a condition. I do not understand how a written agreement can be subject to terms which do not appear upon the face of it.] In *Webb v. Spicer*, 13 Q. B. 886, such a plea was held bad. [*Maule*, J. The plea here does not say, as in that case, that the agreement declared on was made subject to the terms of a contemporaneous collateral agreement, but that *this* agreement was made upon certain conditions, that is, as I understand it, conditions which can operate upon the agreement, by being within and part of it. The sense of the plea is this, that the declaration does not set out the entire sense of the agreement; but that the real contract was, that the whole matter should depend upon the performance by the plaintiff of the condition precedent mentioned in the plea. Can you say that that is not a good plea?] No doubt a plea may be so framed as to shew that the paper the contents of which are set out in the declaration, does not contain the agreement of the parties. But that is not the case. With regard to the sixth plea, it is not contended that a plea of fraud at the time of the making of the contract

may not be a good plea. But it is not every fraudulent representation in a collateral matter that will avoid a written contract. No answer can be given to the case of *Feret v. Hill*. What is said by the Lord Chief Justice there fully supports the present argument. "The real question," says his Lordship, "is, whether, the agreement having been made, and the term vested in the plaintiff, and the plaintiff having been once let into possession, the estate has not so passed as to prevent its being divested by a collateral fraud. There can be no doubt whatever that the defendant intended to do, and in fact did do, everything that was requisite to constitute a valid lease. He executed the instrument,—an instrument sufficient for the purpose of conveying the term,—well knowing its effect; and he delivered possession of the premises to the plaintiff, with the intention of passing the term to him, if any were created by the instrument. What is there to avoid that, or to divest the plaintiff of the interest which has passed to him? The defendant seeks to dispossess the plaintiff, not by reason of any misrepresentation as to the legal effect of the contract he was entering into, but because the plaintiff, at the time of the negotiation for the lease, represented (falsely, it may be,) that he was about to use the premises for a particular purpose. That was, as Mr. Gifford justly observes, a representation as to something altogether collateral to the contract. I do not think that the immoral intention in the mind of the plaintiff at the time, or the immoral use made by him of the premises after he got possession, can have any effect at all upon the validity of the contract." [*Williams, J.* What do you mean by the expression "collateral to the contract?"] Something which does not form part of the contract, and does not affect the value of the thing which is the subject of the contract,—as in *Geddes v. Pennington*. The agreement is an absolute agreement with the plaintiff,

1855.

 CANHAM
 v.
 BARRY.

1855.

 CANHAM
 v.
 BARRY.

to give him possession of the farm, upon his doing a certain thing,—handing over to the defendant the money and the notes stipulated for. All beyond that is collateral. [*Maule, J.* It was material to the defendant to be secure that a respectable man should be put in as tenant. He contracts absolutely to assign the farm: being bound to procure his landlords' assent to his so doing, it was very unlikely that he would enter into such a contract as that, unless he were assured that he could obtain the necessary assent. It can hardly be said that that is collateral to the contract.] If the defendant had intended the contract to be conditional only upon the assent of his landlords being obtained, he should have taken care so to express it. [*Williams, J.* Doubtless he should, unless the agreement is avoided by the fraud.] If this be a case of fraud, the fraud is made up of two propositions,—a misrepresentation as to an existing fact,—and a future intention. [*Williams, J.* And that the defendant was induced to act upon the representation.] The respectability of Main had nothing whatever to do with the contract between the plaintiff and the defendant, unless the plaintiff had alleged at the time that he intended Main to be the occupier of the farm. That amounts to no more than a representation of what he then intends to do when he shall get possession. He may change his mind, as was suggested by *Maule, J.*, in *Feret v. Hill*. The representation of Main is nothing.

As to the
seventh plea.

JERVIS, C. J. I am of opinion that the seventh plea is a bad plea. The question which arises upon it is merely a question of construction. I think the averment that the agreement declared on "was made and entered into on the condition and subject to the terms" that Main should give satisfactory references, means, that the agreement set out in the declaration, which was the

entire agreement between the parties, was made with a condition or understanding orally, and not, as my Brother Maule suggests, with a condition in and forming part of it. And for that reason I think the seventh plea a bad one.

1855.

 CANHAM
v.
BARRY.

As to the sixth plea,—I must confess I feel very much pressed by the case of *Feret v. Hill*: but I think this case cannot in principle be distinguished from it. The question is, whether a representation, which is admitted to be false and fraudulent, was material and influenced the mind of the defendant, and formed part of the inducement for his entering into the contract. The facts to be collected from the plea are these:—The defendant held a farm under a lease which contained a covenant not to assign or underlet without the consent in writing of the lessors. Being desirous of assigning, and having received an assurance from the landlords that their assent would not be withheld if he procured an eligible tenant, he enters into a contract to let the plaintiff into possession of the farm upon certain terms, upon his representation that the party who was to occupy the land was a person of responsibility, and could give satisfactory references; that is, he was influenced and induced to enter into the contract by two circumstances,—one, that his landlords would give their assent,—the other, that the tenant was an eligible tenant, and could give references that would be satisfactory to them: and the latter was false, and false to the knowledge of the plaintiff. Acting upon the faith of the representation made by the plaintiff, the defendant entered into the contract, which otherwise he would not have done. Upon that short ground, I think the sixth plea is a good one.

 As to the sixth
plea.

MAULE, J. With respect to the seventh plea, it strikes me that the proper construction of it is not that which the Lord Chief Justice has put upon it. This dif-

 As to the
seventh plea.

1855.

CANHAM
v.
BARRY.

ference of opinion will not be very material to the parties, inasmuch as I understand that my Brothers Cresswell and Williams are prepared to agree with my Lord: and we are all agreed as to the sixth plea. The material part of the seventh plea, is, that Main was a party to the agreement, and that such agreement was made and entered into on the condition, and subject to the terms, that Main should give to the landlords of the demised premises, or their agent, satisfactory references as to his character, so as to give a reasonable opportunity to them of inquiring as to Main's being eligible as a successor to the defendant in the occupation of the demised premises, and that Main would thereby satisfy the landlords or their agent that he would be eligible as aforesaid; and that Main failed to give such references. Now, when an agreement is said to be made "on the condition and subject to the terms," &c., the only proper construction of the allegation, in my opinion, is, that those terms and conditions are to have a present operation, and consequently must be in the agreement itself. The Lord Chief Justice and my two learned Brothers, however, say that the plea is to be understood as alleging that there was an agreement in writing as mentioned in the declaration, but that there was at the same time another agreement containing these terms of qualification. If an agreement like that is not to operate, it is because the terms of the second agreement cannot act upon the first, but leave the defendant to his cross-action on the second agreement. I think that is not consistent, and does not duly and properly satisfy the terms of this plea. It cannot be said that an agreement is made "subject to" terms which do not act presently upon the agreement itself.

As to the sixth plea, I entirely concur in what my Lord has said about that. Whether or not a party who is shewn to have been induced to enter into a contract

by a misrepresentation in a matter not strictly material to the subject in hand, has the option of refusing on that ground to perform it, we need not now inquire ; because here the representation is sufficiently shewn to be quite material. Having a farm which he had no power to assign without his landlords' consent, the defendant enters into an agreement with the plaintiff absolutely to assign it. A man may, no doubt, for a good consideration contract to do that which he cannot be sure that he will be able to do ; a man may, if he chooses, covenant that it shall rain to-morrow. The defendant, therefore, would be bound by his absolute agreement to assign, notwithstanding his landlords should refuse to give their consent. Accordingly, before he enters into the agreement he asks his landlords if they will consent to his assigning : and he is told, that, if he procures a responsible person to come in as tenant, the consent will be given. The representation, therefore, was by no means in a matter that was fanciful and remote from the subject-matter of the agreement, but in a matter in which the defendant must naturally be most materially interested. But for the plaintiff's representation that Main was a responsible person, the defendant would never have entered into the agreement at all. The representation is made, and it turns out to be false, and false to the knowledge of the plaintiff. I therefore think that this is pretty clearly a case of a contract which the defendant has been induced to enter into by a fraudulent misrepresentation, in a matter that was material ; and consequently I agree with the Lord Chief Justice in thinking that the sixth plea affords a good defence to the action.

1855.

CANHAM
v.
BARRY.

CRESSWELL, J. If the difference of opinion between my Brother Maule and the rest of the court as to the seventh plea had involved any principle of law, I should

Seventh plea.

1855.

CANHAM
v.
BARRY.

Sixth plea.

have desired time for deliberation. But, inasmuch as it is a mere matter of construction involving only a small amount of costs, I do not think it necessary to say more than that I concur in the opinion which has been expressed by the Lord Chief Justice. As to the sixth plea, it involves a statement that the plaintiff procured the defendant to enter into the contract declared on, by means of a false representation as to the character and eligibility as a tenant of the party named. That clearly was a false representation as to a matter which was by no means collateral to an agreement to assign the term. I think this a sufficient ground for holding that the contract was avoided.

WILLIAMS, J. I am of the same opinion. As to the seventh plea, it is unnecessary to say more than that I concur with my Lord and my Brother Cresswell. The sixth plea is, I think, a good plea. The question is, whether the circumstances therein stated disclose such a case of fraud as to avoid the contract. Now, there can be no doubt but that the defendant was induced to enter into the contract by a representation which was false to the knowledge of the plaintiff. It has been strenuously urged that the matter as to which the misrepresentation was made, was so foreign to the contract that it cannot be said that the defendant was induced thereby to enter into it. I do not, however, agree that this is at all a matter of that description. Taking it at the very lowest, assuming the plea to be true, there was a very strong probability that the landlords would have consented to the proposed assignment, if the tenant proved eligible. In consequence of the assurance given him by the plaintiff, the defendant believes that that strong probability exists. The plaintiff, knowing that the defendant would not enter into the agreement unless he received this assurance, fraudulently represents Main to be an eligible

tenant, and one who would be approved. I think that is not a representation as to a matter that is foreign, or, as it is called, "collateral" to the contract. The defendant has made a false representation, knowing it to be false, with intent to induce, and has thereby induced, the defendant to enter into a contract into which but for that misrepresentation he would not have entered. I think a case of fraud is clearly made out.

1855.

CANHAM
v.
BARRY.

Judgment accordingly.

Bovill asked leave to amend the seventh plea, by adding the words "and which were then part of the agreement between the parties." [*Jervis*, C. J. That might be partly by parol and partly in writing.] In truth, it was partly oral and partly in writing.

JERVIS, C. J. That shews that my Brother Maule's construction of the seventh plea is wrong. We cannot allow the amendment: we should require you to shew that the whole was in writing.

Amendment refused.

1855.

GABRIEL and Another *v.* DRESSER.

Jan. 23.

To a declaration upon a contract for the delivery of 600 loads of timber at Dantzic, the defendant pleaded, that, after the accruing of the causes of action, and before suit, it was agreed between the plaintiffs and the defendant, that the defendant should deliver to the plaintiff in London certain other timber, and that such other timber should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes of action upon the contract in the declaration mentioned; that the defendant, in part performance of such agreement, delivered to the plaintiffs,

and they accepted and received of him, 143 loads, on the terms aforesaid, in full satisfaction and discharge of the causes of action in the declaration mentioned, so far as they related to 143 loads of timber in the contract mentioned; and that the defendant, within a reasonable time, *tendered* the plaintiffs the residue of the timber to complete the contract:—

Held, on demurrer, that the plea was neither good as a plea of accord and satisfaction, for want of an averment of satisfaction; nor as a plea of performance, there being no averment, express or implied, that the substituted agreement was accepted in satisfaction.

THE declaration stated, that, by a contract made and entered into on the 13th of July, 1853, the defendant agreed to sell and deliver to the plaintiffs, and the plaintiffs then agreed to buy and receive from the defendant, a certain quantity, to wit, six hundred loads, of common middling Dantzic timber, to average twenty-eight feet in length, and from twelve to sixteen inches scantling, at and for the price of 37*s.* 6*d.* per load, free on board at Dantzic; the timber guaranteed a fair average quality according to description, and to be shipped as early as a vessel could be got; lathwood and deals for stowage, at current rates; payment by bill at three months from handing bills of lading: Averment, that, in a reasonable time after the making of the said contract, the plaintiffs chartered and got ready certain vessels for receiving on board the said loads of timber so sold as aforesaid by the defendant to the plaintiffs; and the said vessels were ready, to wit, on the 1st of August, 1853, to receive on board at Dantzic the said loads of timber,—of which the defendant then had notice; and that they the plaintiffs did all things on their part to entitle them to have the said loads of timber delivered to them by the defendant according to the contract; and, although the defendant delivered to the plaintiffs, and they

the plaintiffs accepted, a certain quantity, to wit, one hundred and forty-three loads of other timber, as and for so much of the timber to be loaded and delivered by the defendant for the plaintiffs as aforesaid, and a reasonable time from and after the time that the defendant had notice as aforesaid that the said ships were ready to receive on board the said timber, for the defendant to deliver the residue of the said timber as aforesaid, had elapsed long before the commencement of this suit: yet the defendant did not nor would deliver to the plaintiffs the said residue of the said timber according to the said contract, but wholly made default therein; and thereby the plaintiffs were deprived of great gains and profits that they otherwise would have gained by the re-sale of the said timber at the market-prices of the day, at the time when the timber should have been so delivered by the defendant, and were also put to great trouble, inconvenience, and cost, and suffered serious damage in consequence of their being unable, by reason of the said default of the defendant, to fulfil and complete a certain contract they had entered into for the supply of timber to certain other persons; and the plaintiffs thereby also lost and were deprived of the use, benefit, and advantage of the said ships, and of the freight or hire which they were obliged to pay and did pay for the same, to a large amount, to wit, 400*l.*, and were otherwise greatly damaged: And the plaintiffs claimed 800*l.*

1855.

GABRIEL
v.
DRESSER.

Fourth plea,—that, after the accruing of the plaintiffs' right of action on the said contract in the declaration mentioned, and before this suit, it was mutually agreed between the plaintiffs and the defendant that the defendant should deliver to the plaintiffs, at the Commercial Docks, in the county of Surrey, certain timber forming part of the respective cargoes of two ships respectively called the "John and James" and the "Venus," and in the place of a like quantity of the

Fourth plea.

1855.

GABRIEL
v.
DRESSER.

said timber by the said contract agreed to be delivered free on board at Dantzic, and that the defendant should make up the balance of the said timber in the said contract mentioned, by delivering to the plaintiffs at the port of London, within a reasonable time in that behalf, such quantity of suitable timber of like quality and description out of certain other ships the defendant might have as should be necessary to make up the residue of the said timber in the said contract mentioned; and that such delivery of the timber forming part of the respective cargoes of the "John and James" and of the "Venus" as aforesaid, and of the said other timber out of the said other ships, should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes and rights of action upon the said contract in the declaration mentioned, and of all damages in respect thereof: That the defendant did thereupon, in part performance of the said agreement in that plea mentioned, deliver to the plaintiffs, and the plaintiffs then accepted and received of the defendant, the said timber forming part of the cargoes of the "John and James" and the "Venus" respectively, to wit, one-hundred and forty-three loads, on the terms aforesaid, and in full satisfaction and in discharge of the causes of action in the declaration mentioned so far as they related to one hundred and forty-three loads of timber in the said contract mentioned: That the defendant did afterwards, and before the suit, and within a reasonable time in that behalf, duly tender and offer to the plaintiffs at the port of London such quantity of suitable timber of like quality and description to the timber in the said contract mentioned, out of certain other ships the defendant then had, as was necessary to make up the residue of the said timber in the said contract mentioned, which said timber the plaintiffs then wholly refused to accept or receive from the defendant:

And that the defendant was thenceforth ready and willing to deliver to the plaintiffs the said timber out of the said other ships, until the expiration of a reasonable time in that behalf, during all which time the said timber necessarily remained and was in an exposed part of the port of London, to wit, in the river Thames, at the risk and expense of the defendant,—of all which the plaintiffs then had notice.

1855.

GABRIEL
v.
DRESSER.

To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being,—“that the plea shews an accord merely, without satisfaction.” Joinder in demurrer.

Channell, Serjt., in support of the demurrer. (a) The plea, if intended as an accord and satisfaction, is bad on the ground that it shews no satisfaction: and if, on the other hand, the making of the agreement itself was relied upon, there is no allegation, either express or implied, that the agreement was *accepted* in satisfaction. The distinction is pointed out in *Flockton v. Hall*, 14 Q. B. 380, where, to a declaration in case for infringing a patent, the defendants pleaded, in bar of the further maintenance of the action, that, after declaration, it had been agreed between the plaintiffs and the defendants, that the defendants should admit their liability to the action, as they then did admit; that the defendants should take, and the plaintiffs grant, a licence for the use of the invention; that the defendants should hand a cheque for 75*l.* to a third person, to be held till the

(a) The points marked for argument on the part of the plaintiffs were,—“That the plea states an accord only, without satisfaction; and that the non-performance by the plaintiffs of the alleged agreement might afford a ground of action against them at the suit of the defendant, but that acceptance by the plaintiffs in satisfaction was essential to the validity of the plea as a plea in bar of the action.”

1855.

GABRIEL
v.
DRESSER.

grant of the licence, and then handed by him to the plaintiffs; that the plaintiffs and defendants should respectively bear their own costs of the action; that "this action, and the causes of action included in the same, should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned:" the plea then alleged that the defendants admitted their liability, drew and delivered the cheque, and had always been ready to perform the agreement, take the licence, and pay their own costs,—of which the plaintiffs had notice: and it was held a bad plea; for that, if the agreement were construed as an *accord* in respect of the things to be done, there was no averment of *satisfaction*,—the stipulations of the defendants not having been all performed; and, if the making of the agreement itself was relied upon, there was no allegation, express or implied, that the agreement was *accepted* in satisfaction; and, further, that the plea was bad, because it left it ambiguous which of the two matters above specified was relied upon as the accord and satisfaction. Coleridge, J., there says: "There may be two kinds of accord: the making of the agreement itself may be what is stipulated for, or the doing the things mentioned in the agreement. In the latter case, the plea, as is admitted, ought to aver that the things have been done, and the agreement, without that, affords no answer. Where the making of the agreement is itself the thing looked to, the plea must aver that it has been accepted in satisfaction: that averment, in truth, carries with it the fact of performance of all that was to be done in order to settle the action: it leaves nothing in fieri, nothing incomplete." The judgment of the court below was affirmed on error: see *Hall v. Flockton*, 16 Q. B. 1039, where Parke, B., in delivering judgment, says,—“The plea is defective in not shewing that the agreement relied upon was accepted in satisfaction; the only alle-

gation on the point being, that 'it was agreed' that certain things should be done, and this action 'settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned.' 'Arrangement' there, must mean something more than 'agreement.' I do not say that there may not be other objections to the plea: but the ground of our decision is, the want of an averment that the agreement on the part of the defendants was accepted in satisfaction." Readiness to perform is not tantamount to performance: Com. Dig. *Accord* (B. 4.).

1855.

 GABRIEL
 v.
 DRESSER.

Milward, contra. It must be conceded that this is not a plea of performance. It shews an agreement to substitute other timber for the timber originally contracted to be delivered, and that a portion has been actually delivered to and accepted by the plaintiffs in part satisfaction of the original contract. [*Maule*, J. The plea professes to be pleaded to the whole cause of action.] The plea is to be taken distributively, according to the 75th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, which provides that "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and, if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered." [*Jervis*, C. J. You misapply that section: it has reference only to the finding of the jury upon issues joined.] The plea states that the defendant, in part performance of the substituted agreement, delivered to the plaintiffs, and the plaintiffs accepted and received of him, one hundred and forty-three

1855.

GABRIEL

v.

DRESSER.

loads of timber by the "James and John" and the "Venus" respectively, "in full satisfaction and discharge of the causes of action in the declaration mentioned so far as they related to one hundred and forty-three loads of timber in the said contract [the original contract] mentioned." [Jervis, C. J. You contend, that by the partial satisfaction, without accord, you may have two judgments? Maule, J. Suppose it had been payment of part pleaded to the whole declaration?] Then it would have been good. [Maule, J. The Common Law Procedure Act did not mean to make a plea good which was bad before, but to give particular pleas a partial efficacy. This plea should have been confined to part of the causes of action.] The substantial question is, whether the plea does not set forth enough to shew an executed contract. It states, that, instead of delivering at Dantzic, as provided by the original contract, the defendant agreed to deliver certain other timber in London, that the plaintiffs accepted part of the substituted timber in satisfaction pro tanto of the original contract, and that the defendant has done all that was in his power to perform the substituted agreement. [Maule, J. In short, it amounts to *tender*. The meaning of an accord and satisfaction is, that there has been an agreement, and that that agreement has been completely performed, and so there has been a total extinguishment of the original cause of action. Here, it was never intended to extinguish the original cause of action by part-performance of the substituted contract.] In *Flockton v. Hall*, there was no tender, and the plea was ambiguous; and, besides, the question arose on special demurrer. [Maule, J. You say this plea is not ambiguous. What does it mean?] That the performance of the substituted agreement should be a satisfaction of the causes of action for the breach of the original contract. [Maule, J. That means, the *whole* performance.] In *Peytoe's*

Case, 9 Co. Rep. 79. a., it is laid down, that, "If a man be bound by bond in 200 qrs. of wheat, upon condition to pay 20*l.*, the obligor may, by accord betwixt them, give him a horse, or a gold ring, &c., in satisfaction of the money, although the money in such case is collateral to the bond; and therefore, if a man enfeoff another by deed, upon condition that the feoffee shall pay a sum of money, &c., the feoffee may, by accord betwixt them give the feoffor a horse, or a gold ring, &c., in satisfaction; and yet the money in such case is collateral, having regard to the land; for, if tender be made, and refusal, he shall never pay the money; ergo, it is a mere collateral, quia reprobata pecunia in hoc casu liberat solventem; and therewith agrees Litt. Cap. Conditions, 79. b. So, if a man be bound by bond in 100 qrs. of wheat, upon condition to pay 50 qrs., he cannot give money or other thing in satisfaction thereof, because the contract originally was, not for money, but for a collateral thing: and, in such case, if the obligor tenders it at the day, and the other refuses, he shall plead it, without saying it is yet ready, because corn is bonum periturum, and it is a charge to the obligor to keep it: and so it was held in 28 H. 8, in the Common Pleas, as Carrel has reported." [Williams, J. In Comyns's Digest, *Accord* (B. 4.), it is said,—“Readiness to perform is not sufficient. An accord must be executed, otherwise there will be no remedy for a non-performance: and, therefore, an accord to pay money in satisfaction is not good, if it shews only that he is *ready to pay*; but he ought to say that he *has paid it*. So, if he shews only a tender and refusal.” For this Chief Baron Comyns refers to *Peytoe's Case*, 9 Co. Rep. 79. b., where Lord Coke says “Every accord ought to be full, perfect, and complete: and, if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed.” He also cites *Shepherd v. Lewis*, 2 Sir T.

1855.

 GABRIEL
v.
DRESSER.

1855.

GABRIEL
v.
DRESSER.

Jones, 6. There, to *indebitatus assumpsit* the defendant pleaded an agreement to do divers things, and averred performance of part, and tender of performance of the residue, which the plaintiff refused; and the plea was held bad on demurrer. That is exactly in point.] The latter part of the judgment of Parke, B., in *Evans v. Powis*, 1 Exch. 601, 608, would seem to shew that a tender would be sufficient.

Per Curiam. The plea is bad, for the causes assigned.

Judgment for the plaintiffs.

THE NORTHAMPTON GAS-LIGHT COMPANY v.
WILLIAM PARNELL and Another.

Jan. 18.

The plaintiffs declared against the defendants, as sureties, upon a deed, dated the 30th of March, 1853, between A., of the first

part, the plaintiffs (a corporation) of the second part, and the defendants of the third part, whereby A., in consideration of a certain sum of money to be paid as therein mentioned, covenanted with the plaintiffs that he would, *on the execution thereof*, commence, and, *within three months from the date of the deed*, finish in a workmanlike manner, a gas-holder tank for the plaintiffs,—with a penalty for default; and the defendants, as sureties for A., covenanted for the due performance by A. of all the covenants, &c., in the deed contained on the part of A., which should be subsisting and not annulled or avoided, and that they would, in case of default, pay the plaintiffs such sum as and for liquidated damages as J. E., the plaintiffs' engineer, *should in his opinion adjudge to be reasonable and proper to be paid for such default*, not exceeding 300*l.* The declaration alleged a default by A., and that the said J. E. had in his opinion adjudged 300*l.* to be reasonable and proper to be paid to the plaintiffs as and for liquidated damages for A.'s default.

The defendants pleaded,—that the plaintiffs did not execute the deed until after the expiration of three months from the date thereof:—Held, bad, inasmuch as the execution of the deed by them was not a condition precedent to their right to sue for a breach of any covenant therein contained; and that the circumstance of their being a *corporation* made no difference in this respect.

The defendants further pleaded,—that, before the adjudication of J. E., the defendants and A. gave him notice that they respectively revoked any submission or reference to arbitration contained in the deed:—Held, bad; the adjudication by J. E. being a mere appraisalment, and not an award.

good and workmanlike manner, and to the satisfaction and according to the direction of John Eunson in the said deed mentioned, forthwith begin, and in a substantial, perfect, and workmanlike manner build, erect, complete, and finish a gas-holder tank, and also execute certain other works in the said deed mentioned or referred to, of the proper materials, and in manner in the said deed, and in the drawings therein referred to, detailed and provided for, subject to the conditions in the said deed expressed; the said tank *to be finished within three months from the date of the said indenture*, ready to receive the gas-holder; and all excavated matter to be removed and deposited on the adjacent ground, to such situation therein as the engineer of the company might in writing from time to time direct, but within a distance of fifty yards from the outside of the said tank; the yard round to be levelled and left clean and neat; the contract to include all and every costs, charge, and expense of materials, workmanship, and carriage of same, also of all implements, tools, and scaffolding, and carriage of same, together with everything of whatsoever kind or nature which might be necessary to begin, carry on, and within the stipulated period to fully, substantially, and satisfactorily complete, all the excavation, brickwork, and puddle comprised and included in the specification and contract, according to the specification and drawings, and in such a manner as should and might be satisfactorily and fairly understood and construed therefrom; the said work to be done under the superintendence and direction, and to the satisfaction also, of the engineer appointed by the directors of the said company for them and on their behalf to superintend the same, and to the satisfaction likewise of the clerk of the works: That it was by the said deed further agreed, that, should it at any time appear that the said John Parnell was neglecting or wilfully delaying the work, or was not using in every

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

way due and reasonable diligence to proceed with and complete the same, or any particular portion thereof, so as to have the same duly and properly finished within the time specified and assigned for such completion, then, in such case as aforesaid, the directors of the said company, by themselves, their engineer, or agent, should have full power, and should be at liberty either to direct, order, and cause additional workmen to be put on at the cost, charge, expense, and risk of the said John Parnell, such additional workmen to be completely under the control and management of the engineer or his clerk of works, or the said directors should have full power and be at liberty to determine and put an end to the contract, and to take the work quite out of the said John Parnell's hands, and to employ other persons to finish the said works: That it was further agreed, that, in the event of its being determined by the said directors to put an end to the contract, and to take the work quite out of the said John Parnell's hands, three clear days' notice of the intention of the said directors so to do, and stating the day on which they intended, by themselves or their engineer, agent, or workmen, to take possession as aforesaid,—such notice to be signed on their behalf by the engineer,—should be given to the said John Parnell, or should be left at his usual place of residence, or it should be sufficient to affix such notice on some conspicuous part of the building: That it was further agreed, that, in the event of the contract being determined and put an end to previous to its determination and discharge by due course of performance, any money or sum of money, instalment, or balance which might be then and there due, or which might be about to become due to the said John Parnell, should be kept back from him, and should be detained in the hands of the directors, or in the hands of any person appointed by them, until the whole of the work should be completed by

whomsoever might be appointed to finish the same, when the full amount of all loss, charges, damage, and expense caused by or arising out of the default of the said John Parnell in proceeding with and duly completing his contract, and of the consequent determination of the contract, and of employing other persons to finish the work, should be defrayed by the said John Parnell, and should be deducted from the sum, instalment, or balance kept back and retained as aforesaid; but that, if the amount of such loss, charges, damage, and expense should be greater than the sum, instalment, or balance so kept back and retained by the directors, then and in such case the said sum, instalment, or balance should be applied to its extent in part liquidation and discharge of such loss, charge, damage, and expense as aforesaid, and the deficiency should be sought to be recovered from the said John Parnell by due course of law: That it was further agreed that the whole of the work should be well and fully completed, and the building should be in a fit and proper state for the gas-holder on or before the 30th of June, 1853, or, in default thereof, the said John Parnell should forfeit and pay to the plaintiffs the sum of 50*l.*, and the sum of 20*s.* for each and every day for and during which the full and satisfactory completion of the work and contract should or might be delayed beyond the aforesaid 30th of June, 1853, and the said directors should have the power and be at liberty to deduct the full amount of any penalty or forfeiture which might accrue and arise as aforesaid from or out of any balance or portion thereof which might at that time remain unpaid; and that the mode of payment should be as therein mentioned: That the defendants, as sureties for the said John Parnell, by the said indenture covenanted with the plaintiffs, that the said John Parnell would well and truly observe, perform, and keep all and every the clauses, covenants, and agreements in the said indenture

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

Time for the
completion of
the work.

Covenants by
defendants as
sureties.

1855.
 THE
 NORTHAMPTON
 GAS-LIGHT
 COMPANY
 v.
 PARNELL.

Breach.

contained or referred to by and on the part of the said John Parnell, his executors or administrators, and which should be subsisting and not annulled or avoided; and that, in default thereof, *the defendants would pay to the plaintiffs such sum or sums of money, as and for liquidated damages, and not in the nature of a penalty, as the said John Eunson, or other the engineer for the time being of the said company, should in his opinion adjudge to be reasonable and proper to be paid for such default, nevertheless in no event to exceed the sum of 300l.* Averment, that, although the plaintiffs and all other persons had at all times done all things necessary to entitle them to have the said tank and works built, erected, completed, finished, and executed in manner and by the time aforesaid, and all necessary times and things in that behalf respectively had elapsed and happened, and the covenants and agreements aforesaid were subsisting, and were not annulled and avoided, yet the said tank and works were not finished and well and fully completed, and the said building in a fit and perfect state for the gas-holder, on the 30th of June, 1853, and the full and satisfactory completion of the said work and contract was delayed beyond the said last-mentioned day, for divers, to wit, three hundred days; and the said tank and works never were finished and completed by the said John Parnell according to the said contract; and the plaintiffs had been put to and incurred loss, charges, damages, and expenses in and about the finishing and completing the said tank and works, by reason of the default of the said John Parnell in observing the covenants and agreements aforesaid, to a large amount, to wit, 1000l.; and the said sum of 50l., and also a large sum of money, to wit, the sum of 300l.,* for each and every day beyond the 30th of June, 1853, during which the completion of the said work and contract was delayed as aforesaid, and also the amount of the said loss,

* "being at and after the rate of 20s."

charges, damages, and expenses, had not been paid to the plaintiffs by the said John Parnell, but remained due and owing to them, contrary to his covenants aforesaid; and the said John Eunson had in his opinion adjudged the sum of 300*l.* to be reasonable and proper to be paid to the plaintiffs as and for liquidated damages for the default of the said John Parnell in well and truly observing, performing, and keeping the clauses, covenants, and agreements aforesaid; and all other things had been done, and all times had elapsed, necessary to entitle the plaintiffs to have and receive of and from the defendants the said last-mentioned sum of 300*l.*; yet that the said sum of 300*l.* remained due and unpaid and in arrear to the plaintiffs, &c.

The defendants, pleaded,—first, that the said deed in the declaration mentioned was and is an indenture commencing in the words following,—“This indenture made the 30th of March, 1853, between John Parnell, of &c., of the first part, The Northampton Gas-Light Company (meaning the plaintiffs), acting in pursuance of an act passed in the fourth year of the reign of King George the Fourth, intituled ‘An act to establish a company for lighting with gas the town of Northampton,’ of the second part, and William Parnell, of &c., and Thomas Williams, of &c. (meaning the defendants), of the third part: Whereas the said parties hereto of the second part (meaning the plaintiffs) have proposed to cause to be erected on a piece of ground near to their gas-works, a gas-holder tank, with its appurtenances: And whereas tenders for the erection of the said gas-holder tank have been received, in reply to advertisements publicly circulated for that purpose; and the said parties hereto of the second part (meaning the plaintiffs) have agreed to adopt and accept the tender and proposal of the said John Parnell for the making of the same, according to and in conformity with the specifications herewith em-

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

First plea.
Non-execution
of the deed by
the company.

1855.
THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

bodied, and according to the drawings signed by the said John Parnell and John Eunson, engineer to the said company (meaning the plaintiffs), at or for the price or sum of 803*l.* 10*s.*: And whereas the said John Parnell hath proposed the said William Parnell and Thomas Williams, with their consent, to be his sureties for the performance of the said work, in manner hereinafter contained: Now, this indenture witnesseth, that, in consideration of the sum of money in manner hereinafter agreed to be paid to the said John Parnell by the said parties hereto of the second part (meaning the plaintiffs), the said John Parnell doth hereby, for himself, and for his executors and administrators, covenant, promise, and agree with and to the said parties hereto of the second part (meaning the plaintiffs), their executors and administrators, in manner following, that is to say, that he the said John Parnell, his executors or administrators, shall and will, on the execution of these presents, commence, and in a good and workmanlike manner, and to the satisfaction and according to the direction of the said John Eunson, forthwith begin, and in a substantial, perfect, and workmanlike manner, build, erect, complete, and finish the said gas-holder tank, of the proper materials, and in manner detailed in the specification following,"—which said covenant as hereinbefore set forth formed part of the several covenants of the said John Parnell contained in the said deed: That the said deed then proceeded to specify the works to be done by the said John Parnell, and also contained divers other clauses and stipulations (some of which were stated in the declaration), and, amongst others, it purported to contain a covenant or agreement on the part of the plaintiffs with the said John Parnell as to the mode of payment by the plaintiffs to the said John Parnell for the said work,—as by the said deed, reference being thereunto had, would more fully and at

large appear: That the plaintiffs did not execute the said deed until after the 30th of June, 1853, and after the expiration of the said period, to wit, of three months from the date of the said deed in the declaration mentioned, and after the supposed breaches of covenant by the said John Parnell in the declaration mentioned: And that the plaintiffs never paid to the said John Parnell any part of the sum in the said deed mentioned, and therein expressed to be agreed to be paid by the plaintiffs to the said John Parnell.

Second plea,—That, after the date and making of the said deed in the declaration mentioned, it appeared to the directors of the said company (as the fact was) that the said John Parnell was neglecting or wilfully delaying the work in the said deed mentioned, and was not using in every way due and reasonable diligence to proceed with and to complete the same, so as to have the same duly and properly finished within the time specified or assigned in the said deed for such completion: That thereupon the directors of the said company determined to put an end to the said contract, and to take the work quite out of the said John Parnell's hands, and to employ other persons to finish the said works in pursuance of the power in that behalf contained in the said deed, as in the declaration mentioned: That the directors of the said company, by the said John Eunson, their engineer, gave the said John Parnell three clear days' notice in writing, signed on their behalf by the said John Eunson as their engineer, of the said determination of the said directors to put an end to the said contract, and to take the work quite out of the hands of the said John Parnell, at the expiration of three clear days from the day of the date of the said notice, and thereupon to take possession of the whole of the said work, and to deal therewith as they might be advised: That, forthwith after the expiration of the said three clear days in the

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

Second plea.
Revocation of
Eunson's
authority.

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

said notice mentioned, the said directors did determine and put an end to the said contract, and take the said work quite out of the hands of the said John Parnell, and employ other persons to finish the said works according to the survey [specification?] in that behalf contained in the said deed, as in the declaration mentioned; and that thereupon divers of the clauses, covenants, and agreements on the part of the said John Parnell contained in the said deed ceased to be subsisting, and then became and were annulled and avoided pursuant to the provisions in that behalf contained in the said deed, as in the declaration mentioned,—of all which premises respectively the said John Eunson had notice, and well knew, before and at the time when he made the adjudication thereafter mentioned: That, before the said adjudication of the said John Eunson in the declaration mentioned, the said John Parnell, and also the defendants, respectively, gave notice in writing to the said John Eunson that they respectively revoked any submission or reference to arbitration contained in the said deed, and thereby also requested him the said John Eunson not to make any award or adjudication touching or relating to any of the matters mentioned in the said deed: That the said John Eunson made the said adjudication in the declaration mentioned, in the absence of the said John Parnell and of the defendants respectively, and without any notice to them, or any or either of them, of his the said John Eunson's intention to consider or proceed on the matters so adjudicated on, and without giving them, or either of them, any opportunity of being heard before him, [or of adducing] any evidence touching or relating to any of the matters so adjudicated upon: And that the said adjudication in the declaration mentioned was and is an instrument in writing, in the words following,—“Whereas, under and by virtue of an indenture dated the 30th of March, 1853,

and made between John Parnell of the first part, The Northampton Gas-Light Company of the second part, and William Parnell and Thomas Williams of the third part, the said John Parnell, for the consideration therein mentioned, covenanted and agreed with the said Northampton Gas-Light Company to erect a gas-holder tank, and to execute certain works therein mentioned at Northampton; and the said William Parnell and Thomas Williams, as sureties for the said John Parnell, did covenant with the said company that the said John Parnell would truly observe, perform, and keep all and every the clauses, covenants, and agreements contained in the said indenture; and, in default thereof, they the said William Parnell and Thomas Williams would pay to the said company such sum or sums of money, as and for liquidated damages, as I, John Eunson, the engineer of the said company, should in my opinion adjudge to be reasonable and proper to be paid for such default, such sum, nevertheless, in no event to exceed the sum of 300*l*. : And whereas the said John Parnell has made default in the execution of the said works, and has not observed, performed, and kept all and every the covenants and agreements mentioned and contained in the said indenture : And whereas I have been directed to adjudge the sum, if any, in my opinion reasonable and proper to be paid by the said William Parnell and Thomas Williams for such default by the said John Parnell : Now, therefore, I the said John Eunson, in exercise and execution of the authority vested in me by the hereinbefore in part recited indenture, having taken upon me the burthen of the said reference, and having examined into all the matters and premises touching the said contract, and the non-observance and non-performance of the several clauses, covenants, and agreements contained in the said indenture, do adjudge that the said company has sustained damage in consequence thereof, and assess the same at

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

1855. the sum of 300*l.*, and do adjudge that the sum of 300*l.*
 is a reasonable and proper sum to be paid by the said
 THE NORTHAMPTON GAS-LIGHT COMPANY
 v. PARNELL. William Parnell and Thomas Williams to the said
 Northampton Gas-Light Company, for the default of
 the said John Parnell. As witness my hand this 30th
 day of May, 1854. John Eunson."

Demurrers. The plaintiff demurred to these two pleas (taking
 issue also upon the second plea), the grounds marked
 in the margin being,—as to the first plea, that "the
 non-execution of the deed until the time mentioned in
 the plea, is no justification for or answer to the breach
 alleged,"—and, as to the second plea, that "the alleged
 adjudication of the said John Eunson is not in the nature
 of an award, nor is the power to make the same subject
 to revocation, and, if it were, the revocation should have
 been alleged to have been under seal."

As to the first plea. *Field*, in support of the demurrers. (a) The first plea
 is clearly bad: the non-execution of the deed by the
 plaintiffs is no answer to an action against the defendants
 for a breach of covenant on their part: *Foster v. Mapes*,
Cro. Eliz. 212; *Morhan v. Pike*, antè, Vol. XIV, p. 473.

As to the second plea. The second plea is equally bad: it raises three distinct

(a) The points marked for
 argument on the part of the
 plaintiffs, were:—

"As to the first plea,—that
 the defendants' contract being
 under seal, and being for the
 performance of works by a
 time named in the contract,
 viz., the 30th of June, the
 non-execution by the plaintiffs
 until after that date does not
 avoid the defendants' contract.

"As to the second plea,—
 that the alleged adjudication of
 John Eunson is a mere valua-
 tion of damages, and is not in

the nature of an award, nor
 liable to the incidents of one;
 that the power given by the
 contract to make the same is
 not subject to revocation, and,
 if it were, the revocation should
 have been alleged to have been
 under seal; that the adjudica-
 tion is sufficient; and that the
 circumstances under which it is
 alleged that the adjudication
 was made form no answer to
 an action, even if it be consi-
 dered that such adjudication is
 attended with the properties of
 an award."

points, all of which rest upon one false analogy, viz. that the stipulation in the deed, that, in case of default by John Parnell, the defendants would pay to the plaintiffs such sum or sums of money, as and for liquidated damages, and not in the nature of a penalty, as John Eunson, or other the engineer for the time being of the said company, should, in his opinion, adjudge to be reasonable and proper to be paid for such default,—amounts to a submission to arbitration. It is submitted that that is a mere agreement entered into by the covenantors with the covenantees, that, in the event of a claim arising against the former out of the default of John Parnell, the individual named shall be the person by whose opinion as to the amount of compensation to be paid, the parties shall mutually be bound. It is a mere condition on which a cause of action is to arise, and not a submission of a cause of action to arbitration. It contains none of the usual stipulations of a submission to arbitration. It is like the cases of *Jenkins v. Betham*, antè, p. 168, and *Cumberland v. Bowes*, antè, p. 348, where it was attempted to treat an appointment of valuers as a reference to arbitration. [*Jervis*, C. J. If it is not a submission to arbitration, there is an end of the other points. *Maule*, J. Would it be a submission to arbitration, if parties were to stipulate that certain work should be paid for “according to the measurement of A. B.?” *Jervis*, C. J. I think we must hear what can be said in support of the pleas.]

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

Keating, contrà. (a) 1. It may be conceded that the As to the first plea.

(a) Points for argument delivered with the defendants' demurrer-books:—

“1. That the execution of the deed by the company was a condition precedent, putting

a reasonable construction on the words ‘shall and will on the execution of these presents commence,’ &c.: that the work was to be done ‘in consideration of the sum of money in

1855.
 THE
 NORTHAMPTON
 GAS-LIGHT
 COMPANY
 v.
 PARNELL.

mere circumstance of a covenantee not having executed a deed, will not prevent his enforcing the covenants by action. But there are cases, besides the case of a lease, where the execution of the covenantee is necessary; for instance, where the execution of the covenantee goes to the whole consideration of the covenants on the other side. Here, the period for the commencement of the

manner hereinafter agreed to be paid to the said John Parnell,' and the deed purports to contain a covenant or agreement on the part of the plaintiffs with the said John Parnell as to the mode of payment by the plaintiffs to the said John Parnell for the said work: that, if John Parnell had done all the work pursuant to the deed and specification, he would have had no legal remedy against the company for the stipulated price or sum, or any part thereof: that the company not having executed the deed until after the 30th of June, 1853, had elapsed, and never having paid any part of the stipulated price or sum, had no just right of action: that the declaration expressly alleges that the plaintiffs have at all times done all things necessary to entitle them to have the said tank and works built, erected, completed, finished, and executed in manner and by the time aforesaid; and the plea in effect negatives that:

"2. That the second plea shews that the adjudication of Eunson was made under such circumstances (stated in the

plea) that it was void in law: that his adjudication (which is set out in the plea) shews upon the face of it that the 300*l.* was adjudicated in respect of the non-observance and non-performance of all and every the covenants, &c., contained in the deed; whereas the defendants' liability as sureties was of a more limited nature, being confined to such of the covenants, &c., 'which should be subsisting, and not annulled or avoided, and, in default thereof,' i. e. of performance of such covenants, &c., the defendants would pay such sum as Eunson should adjudge to be reasonable and proper to be paid 'for such default,' not exceeding 300*l.*: that the second plea shews that divers of the covenants, &c., were not subsisting, but had been annulled and avoided by the company, whereof Eunson had notice before he proceeded to adjudicate, nevertheless the 300*l.* was expressly adjudicated in respect of the breaches of all the covenants, &c., and not merely of those for which the sureties were liable; and consequently that the adjudication was bad."

work by John Parnell is fixed by the terms of the deed, —“on the execution of these presents.” Execution, therefore, by all parties was essential and necessary. The plaintiffs are a corporation, and consequently could only be bound under their corporate seal,—*Lamprell v. The Bellericay Union*, 3 Exch. 283. [*Jervis*, C. J. There is some conflict of opinion between this court and the Exchequer upon that point. But I do not see how the fact of the plaintiffs being a corporation affects the argument one way or the other.] In construing the deed, the court will look to the whole of it, and to the intention of the parties. It was perfectly competent to the parties to contract that the work should be commenced only after complete execution of the deed: and the fact of the plaintiffs being a corporate body shews that there was a good reason for that stipulation; it would certainly be more prudent that a man who is about to do a large amount of work for a body of that description should avoid all doubt or difficulty in the way of his obtaining payment, by insisting that the contract should be made in such a form as to enable him to enforce it. It is true, John Parnell engages to complete the work within three months from the date of the indenture: but that, of course, must have reference to the commencement of the work. In the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 *b*, it is said: “It is justly observed that covenants, &c., are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention.” [*Jervis*, C. J. You are asking us to give a technical meaning to the word “execution.” The popular understanding of the covenant would be, that John Parnell would upon *his* execution of the deed commence the work, and complete it within three months from that time.] If he were speaking of his own execution of the

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

1855.

 THE
 NORTHAMPTON
 GAS-LIGHT
 COMPANY
 v.
 PARNELL.

deed only, one would expect to find the words "forthwith" or "on executing." [*Cresswell, J.* Suppose the stipulation had been that the work should be completed within three months from the execution of the deed, and the deed was executed by the defendants and by John Parnell at once, and by the plaintiffs a fortnight afterwards,—from which date would the three months run?] From the time of the *complete* execution. [*Cresswell, J.* If John Parnell and the defendants had intended not to be bound until the plaintiffs had executed the deed, they might have delivered it as an escrow.] Unless the execution by the plaintiffs was a condition precedent, the principal, John Parnell, for whose default alone the defendants are bound, would have no security. That shews that it must have been the intention of the parties that the deed should be completely and perfectly executed.

As to the second
 plea.

2. This is a submission to arbitration, and not merely a valuation or appraisalment. The referee, Eunson, was to exercise a judicial discretion upon the matters submitted to him. He was to determine the extent of John Parnell's default, with reference to such covenants in the deed as were subsisting and not annulled. That is clearly a duty of a judicial character. In *Jebb v. M'Kiernan*, M. & M. 340, a bond, conditioned for the due discharge by A. M. of the duties of clerk, provided that such discharge should be ascertained by the inspection of A. M.'s accounts by one Stanton, and that the amount so ascertained should be liquidated damages. Upon the execution of a writ of inquiry, a paper in Stanton's handwriting was produced, in which he had ascertained the amount of deficiency in A. M.'s accounts. It was objected to on the ground that it required an award stamp; to which it was answered, that an award stamp was not necessary in that case any more than on a valuation of crops, &c., between an outgoing and an incoming

tenant; and *Leeds v. Burrows*, 12 East, 1, was referred to. Parke, J., said: "There is a material difference between the present case and that cited, which was merely the valuation of a given subject. Here, the person named is to determine whether there is anything due. However hard it may be, I incline to think that such a determination is an award, and requires a stamp accordingly." [*Jervis*, C. J. There, Stanton was to judge from the examination of A. M.'s accounts, and to ascertain whether he had conducted himself faithfully towards his employers. *Maule*, J. The paper was offered in that case to shew the amount of damages in that action, by the decision of a person chosen to decide between the parties. That manifestly was the case of a submission to arbitration. *Jervis*, C. J. I very much doubt the correctness of that ruling. (a)] The supposed submission could not have been revoked. [*Maule*, J. The old rule upon which it was held that the power of an arbitrator was revocable, was, that a power not coupled with an interest, was revocable, — revocable by the authority which created it. From that rule it was inferred, — erroneously, as I think, — that one or the parties to a submission might revoke without the other. It seems to me that that was allowing one man to affect the interest of another. But it was an inveterate error.] In *Carr v. Smith*, 1 Dav. & Mer. 192, the accounts of a coaching concern, in which several persons were interested as contractors with each other to horse the coaches on different portions of the road, were referred at stated periods to a person who adjusted them, and, after ascertaining how much each had received and disbursed, divided the profits among them according to their respective interests, directing those who had money to pay to the partnership, to hand it over to those

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

(a) A rule nisi was obtained, but on shewing cause, the matter was compromised.

1855.

 THE
 NORTHAMPTON
 GAS-LIGHT
 COMPANY
 v.
 PARNELL.

who had to receive. In an action for money had and received by one of such contractors against another, an account so adjusted was offered as evidence of the balance due: and it was held, on the authority of *Jebb v. M'Kiernan*, that, as the account (not having been assented to) could only be binding upon the defendant by reason of some power given to the accountant as a referee, the instrument was an award. Here, Eunson was to take into consideration what covenants were subsisting, and what default John Parnell had been guilty of, and to assess damages thereon. [*Maule, J.* Not damages; but the sum to be paid. It really is the ordinary case of an engineer certifying for work done. Here, he estimates defaults.] With reference to subsisting covenants. [*Maule, J.* He had no power to determine the subsistence of the covenants.] His discretion as to the amount is to be regulated by the subsistence of the covenants. There are many circumstances upon which he would have to exercise a judicial discretion. [*Williams, J.*, referred to *Scott v. Avery*, 8 Exch. 487, where an agreement to fix the amount of losses on policies by reference to certain persons, was not an agreement to refer to arbitration. *Jervis, C. J.* Is an average stater an arbitrator? *Maule, J.* The amount is not to be ascertained by Eunson only, but by any other the engineer of the company. That alone is conclusive.]

JERVIS, C. J. I am of opinion that the demurrer to these two pleas must be allowed, and that the plaintiffs are entitled to the judgment of the court. Two points only were made in the argument,—though the second might have branched out into several propositions if the first that was urged could have been urged successfully. The first question was, whether the non-execution of the deed by the company afforded any defence. It was ad-

mitted,—on the authority of *Morgan v. Pike*, antè, Vol. XIV, p. 473, and the cases there cited,—that, except in certain cases, a covenantee may sue on a deed although he has not executed it: but it was insisted that here were circumstances disclosed on the face of this deed to shew that its execution by the plaintiffs was a condition precedent to their right to put it in suit. Looking at the deed, I can discover nothing in it to restrain the plaintiffs from contending that they are within the general rule. The words upon which the defendants place reliance, are these,—the deed being dated, and, for anything that appears executed by John Parnell and the defendants, on the 30th of March, 1853,—“in consideration of the sum of money in manner hereinafter agreed to be paid to the said John Parnell by the said parties hereto of the second part (the plaintiffs), the said John Parnell doth hereby, for himself, his executors and administrators, covenant, promise, and agree with and to the said parties hereto of the second part, their executors and administrators, in manner following, that is to say, that he the said John Parnell, his executors or administrators, shall and will, *on the execution of these presents*, commence, and in a good and workmanlike manner, and to the satisfaction, and according to the direction of the said John Eunson, forthwith begin, and in a substantial, perfect, and workmanlike manner build, erect, complete, and finish the said gas-holder tank, of the proper materials, and in manner detailed in the specification,” &c.: and then the deed goes on to provide that the said tank shall be finished within three months from the date of the said indenture. It is said that this shews that nothing is to be done towards the performance of the work contracted for until the execution of the deed by all parties,—more especially as the plaintiffs are a corporation, and no prudent man would enter into such a contract with such a body, who can only be

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

bound by their corporate seal, unless they did duly execute it. But I do not think we are justified in laying down any different rule upon this subject in the case of a corporation from that which governs individuals; and therefore I do not think the circumstance of the plaintiffs being a corporate body affords any sufficient reason for departing from the general rule. If the words used are doubtful, then the rule applies, that doubtful words are to be construed most strongly against the party whose words they are; and, so construing them, I think John Parnell has fixed the time for the commencement of the work at the time of *his* execution of the deed, and that the covenant to complete it is an independent covenant which the plaintiffs are entitled to enforce although they had not executed it. As John Parnell might have protected his own and his sureties' interests by delivering the deed as an escrow, as my Brother Cresswell has suggested, and as the words used may well be satisfied by holding them to mean, "upon my execution of the deed I will commence the work," and the parties have acted upon that notion, I think we do no violence to the deed in holding that the execution by the company was not a condition precedent.

As to the second
plea.

The validity of the second plea depends upon whether or not the provision in the deed, that, in case of default by John Parnell to perform the covenants on his part, the defendants would pay to the plaintiffs such sum "as the said John Eunson or other the engineer for the time being of the company should in his opinion adjudge to be reasonable and proper to be paid for such default," amounts to a submission to arbitration. I am of opinion that it is nothing more than a stipulation for a valuation or appraisalment by Eunson. What judicial powers are intrusted to him? It is not referred to him to say whether the covenants are or are not broken. Mr. Keating admits that the plaintiffs were still bound to

aver and to prove before a jury that there has been a breach of covenant by John Parnell. That shews at once that Eunson is not an arbitrator: and what my Brother Maule pointed out, viz. that the amount to be paid for default is to be ascertained by Eunson "or other the engineer for the time being of the said company," is also strong to shew that it is not a reference. The parties never could have intended that this shifting responsibility should apply to the character of an arbitrator. For these reasons, I am of opinion that the plaintiffs are entitled to the judgment upon both the demurrers.

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

MAULE, J. I am of the same opinion. The first question,—as to the execution of the deed by the plaintiffs being a condition precedent,—may, I think, be disposed of by the rule to which the Lord Chief Justice has referred, *Fortius contra preferentem verba accipiuntur*. The principal covenantor, John Parnell, covenants that he will "on the execution of these presents" forthwith begin the work; and he further covenants that the whole should be well and fully completed "on or before the 30th of June, 1853." That in some sense the words "on the execution of these presents" are satisfied by execution by the defendants and John Parnell, is clear: and the plaintiffs may very well say that it is in *that* sense the words are used. They cannot mean on the execution of the deed by the plaintiffs, there being no execution by John Parnell or the defendants: a man does not usually contract to do a thing at a day past. I think the intention of the parties is tolerably apparent. Certain work was to be done by John Parnell. The indenture was probably prepared some time before its execution; and it could not be known exactly when the execution would take place. The deed is described as an indenture of the 30th of March, 1853. Whether the date was filled up or not, the intention was, that John Parnell

As to the first
plea.

1855.
 THE
 NORTHAMPTON
 GAS-LIGHT
 COMPANY
 v.
 PARNELL.

should commence the work at the earliest possible day: and the earliest day he could bind himself to begin would be, on or immediately after his execution; accordingly he contracts that he will, on the execution thereof, *forthwith* begin, &c.; and three months after the date of the indenture is fixed as the latest period for the completion of the work. It was natural that the parties should appoint the earliest day; and they did so, by naming the day of the execution of the indenture by John Parnell. Upon the first point, therefore, I think the proper construction of this deed, is, that put upon it by my Lord, viz. that execution thereof by the plaintiffs was not a condition precedent to their right to sue upon it.

As to the second
 plea.

With respect to the second plea, it seems to me, that, to distinguish this from the ordinary case of an engineer certifying for the amount of work done, would be extremely inconvenient. The duty imposed upon Mr. Eunson here was, not to determine whether or to what extent the covenants of the deed had been broken by John Parnell, but simply what sum would in his opinion be a reasonable compensation to the company for John Parnell's default in the performance of the work. It was never intended to give him power to determine any matter in dispute between the company and John Parnell or the defendants. But, assuming a default to have been made, he is to ascertain or measure the amount of compensation. Upon both grounds, therefore, I think the plaintiffs are entitled to judgment.

CRESSWELL, J. I am of the same opinion. The effect of the deed, as it seems to me, is, that, as soon John Parnell has entered into the contract and bound himself by his execution of it, he is *forthwith* to commence the work, and to complete it within three months from the date. I also think there is no pretence for saying that

Mr. Eunson was to take upon himself the functions of an arbitrator.

1855.

THE
NORTHAMPTON
GAS-LIGHT
COMPANY
v.
PARNELL.

WILLIAMS, J. I am of the same opinion, upon both points. As to the first point, if Mr. Keating's agreement were a sound one, it would follow that John Parnell would have three months from the time of *commencing the work* within which to complete it; whereas the deed gives an actual day for the completion, viz. the 30th of June, 1853, which is three months from *the date of the deed*. As to the second point, the inclination of my opinion is, that the stipulation in the deed, that, in case of default by John Parnell, the defendants should pay to the plaintiffs such sum as John Eunson or other the engineer for the time being of the company should in his opinion judge to be reasonable and proper to be paid for such default, does not amount to a submission to arbitration, but is merely a stipulation, that, a default having taken place, the ascertainment of the sum to be paid as a satisfaction for such default shall be a condition precedent to the plaintiff's right to recover. The principle is precisely that laid in *Avery v. Scott*, 8 Exch. 487, 22 Law Journ. N. S., Exch. 287, 290, where it is said by Coleridge, J., that "this is like the ordinary case of a party who has a claim for work and labour under a contract by which it has been agreed that he shall be limited to what sum a third person shall certify to be due. He must get the certificate before he can bring his action. That stands upon a principle perfectly unquestioned."

Judgment for the plaintiffs.

1855.

Jan. 24.

In consideration that A., who was in the possession and occupation of premises wherein he carried on the business of a milkman, would yield up the possession and occupation of the said premises to B., and permit him thenceforth to occupy the same, and would assign over to B. all his property in the stock and plant, and deliver the same to B., the latter promised to pay A. a certain sum:—
Held, that this was a contract for an interest in or concerning lands, within the 4th section of the 29 Car. 2, c. 3.

SMART v. HARDING.

THIS was an action brought by the plaintiff to recover the balance of the price agreed to be paid to him by the defendant on the sale of a "milk-walk."

The first count of the declaration stated, that, before and at the time of the making of the agreement therein-after mentioned, the plaintiff carried on the trade and business of a milkman within a certain district extending over a certain small and reasonable distance, to wit, two miles from the premises thereafter mentioned, where he sold milk to divers persons for profit and reward to the plaintiff in that behalf; and *the plaintiff was also then in possession and occupation of certain premises where the plaintiff then carried on the said business, and was also then possessed of certain stock and plant belonging to and used in the said business: that therefore, in consideration that the plaintiff would then yield up the possession and occupation of the said premises to the defendant, and permit him thenceforth to occupy the same, and would then assign over to the defendant all his, the plaintiff's, property of and in the said stock and plant, and deliver the same to the defendant, and would retire thenceforth from the said business within the said district, and would then and thenceforth permit and suffer the defendant to carry on the said business within the said district in his, the plaintiff's, stead, the defendant then promised the plaintiff immediately thereupon to pay to the plaintiff the sum of 80*l.*: Averment of performance by the plaintiff: Breach, that the defendant did not nor would thereupon, or at any time, pay to the plaintiff the sum of 80*l.*, but the sum of 51*l.* 5*s.* 3*d.*,*

parcel thereof, only, and no more, and the sum of 28*l.* 14*s.* 9*d.*, residue of the said sum of 80*l.*, still remained and was due and unpaid from and by the defendant to the plaintiff.

1855.

SMART
v.
HARDING.

There was also a count for money found due from the defendant to the plaintiff on an account stated.

The defendant pleaded,—first (to the first count), that he did not agree as alleged,—secondly (to the second count), never indebted,—thirdly (to the first count), that the plaintiff did not assign over the said property and premises in that behalf alleged by him to have been assigned to the defendant, in accordance with the terms of the said agreement as in the said count alleged,—fourthly, fraud and covin.

The cause was tried before Cresswell, J., at the second sitting in London in Michaelmas Term last. It appeared, that, in September, 1853, the defendant agreed to purchase from the plaintiff a milk-walk in Barnsbury Road, Islington, for the sum of 80*l.*, *including possession of the premises* (of which he was tenant from year to year) and plant, cans, pails, &c. At the time the contract was entered into, the plaintiff represented the business done to amount to between twelve and fourteen barn gallons daily, and that all the customers, with two or three exceptions, were full-price customers: and it was agreed that possession should be given in three weeks. In consequence, however, of the death of his wife, the plaintiff prevailed upon the defendant to take possession at once, which he accordingly did, paying down 50*l.*, and promising to pay the balance when the agreement was ready for execution. Finding that the plaintiff had misrepresented the condition of the business, both as to the quantity of milk sold, and as to the quality of the customers, the defendant refused to pay the balance of the purchase-money: and thereupon this action was brought. No agreement was ever executed.

1855.

SMART
v.
HARDING.

On the part of the defendant, it was submitted, that, inasmuch as the bargain between the parties included a stipulation that the defendant should have possession of the premises where the business was carried on, and so become tenant thereof instead of the plaintiff, the contract was for "an interest in or concerning lands," and was therefore void by the 29 Car. 2, c. 3, s. 4, for want of a memorandum in writing.

The learned judge,—reserving leave to the defendant to move to enter a verdict for him, or a nonsuit, if the court should think the objection well founded,—left the case to the jury upon a conflict of evidence: and they returned a verdict for the plaintiff for the amount claimed.

Byles, Serjt., on a subsequent day in the same term, accordingly obtained a rule nisi to enter a verdict for the defendant or a nonsuit, or for a new trial on the ground that the verdict was against evidence. He referred to *Cocking v. Ward*, antè, Vol. I, p. 858, and *Kelly*, app., *Webster*, resp., antè, Vol. XII, p. 283.

Temple, Q. C., now shewed cause. This was not an agreement or contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them, within the 4th section of the statute of frauds. The case is materially distinguishable from *Cocking v. Ward*. The agreement there was an agreement that everything should take place between the parties which should be requisite to give the plaintiff an estate in the premises: that might be by a contract in writing, or by a surrender by operation of law. But, to make a surrender by operation of law, three things must concur,—there must be a quitting of possession by the first tenant, a power to the substituted tenant to come in, and the consent or permission of the landlord or lessor:

Thomas v. Cooke, 2 B. & Ald. 119, 2 Stark. N. P. 408. If the agreement be, to do only one of these three things, the case is not within the statute of frauds. There was nothing in the present case binding upon the plaintiff to do anything to transfer to the defendant any interest he might have in the premises: there was no evidence of any contract that he should do what is required by the case of *Thomas v. Cooke*. [*Jervis*, C. J. If the landlord consents, Harding is to become his tenant: if not, he is tenant to Smart for the extent of his interest in the premises.] No doubt, an agreement, as in *Cocking v. Ward*, to give up a tenancy, and to endeavour to prevail upon the landlord to let in another, is an agreement for an interest in or concerning lands. But that is not the contract here: it is merely that the plaintiff would "yield up the possession and occupation of the premises to the defendant, and permit him thenceforth to occupy the same:" there is no contract to surrender the premises to the landlord, and to endeavour to prevail on him to accept the defendant as his tenant. [*Maule*, J. Suppose a man dies leaving a chattel interest in land,—does not the executor or administrator take the land, though not mentioned? And is it not by operation of law? Or, suppose the case of a bankrupt?] In the case of a bankrupt, the assignee takes by virtue of the statute: the executor or administrator is in of the estate of the deceased. *Buttemere v. Hayes*, 5 M. & W. 456, rather favours the distinction now contended for. [*Jervis*, C. J. Can there be a doubt as to the meaning of the parties? It is quite clear that the plaintiff was to quit and the defendant to take possession of the premises, and to keep it as long as he could.] Suppose the plaintiff had been a mere tenant at will, and the landlord had determined his will the moment after the defendant got possession, could he have had an action against the plaintiff? [*Cresswell*, J. You have no right

1855,

 SMART
 v.
 HARDING.


1855.

SMART
v.
HARDING.

to assume that the landlord could turn the defendant out: there was evidence that the plaintiff held the premises as tenant from year to year. *Maule, J.* Do you contend that the contract is not within the statute of frauds, because the landlord's consent is necessary to a valid assignment?] No. But it is submitted that the bargain proved in the present case does not amount to an agreement on the plaintiff's part to sell or assign his interest in the land. It may be that the defendant acquired an interest as undertenant to the plaintiff; and that need not have been in writing. If, on the other hand, it amounted to more, there was something else to be done, viz. to endeavour to induce the landlord to accept the defendant as tenant. But, could the defendant here have sued the plaintiff for not using endeavours to obtain the landlord's assent, upon this agreement? If not, the agreement clearly need not be in writing.

Byles, Serjt., and Morgan Lloyd, in support of the rule. The 4th section of the statute of frauds enacts that no action shall be brought "upon any contract or sale of lands, tenements, or hereditaments, *or any interest in or concerning them*, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." Here, the plaintiff was tenant of the house for some term, it may be from year to year, paying rent and rates and taxes. He entered into an agreement with the defendant to go out, and to let the defendant come in and be tenant to the same landlord. This is necessarily either an agreement to assign his term to the defendant, or that he will surrender it, and that the landlord shall re-deliver possession to the defendant. Whether or not the plaintiff had power to

cause his landlord to do this, is quite immaterial : it is still a contract for an interest in lands. In *Buttemere v. Hayes*, 5 M. & W. 456, A., being possessed of premises for the residue of a certain term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs ; and it was held, that this was an agreement relating to the sale of an interest in lands, within the 29 Car. 2, c. 3, s. 4. Parke, B., there says : " Perhaps, if the declaration had stated an agreement to relinquish the possession merely, it might not have amounted to a contract for an interest in land : but it goes on to allege that the plaintiff was to suffer the defendant to become tenant thereof for the residue of the term. Now, he could not become tenant for the residue of the term, except by an assignment, and that would be a contract for an interest in lands within the statute, and ought to be reduced into writing." In *Cocking v. Ward*, antè, Vol. I, p. 858, a count in assumpsit stated that A. was the occupier of a farm as tenant to one V. ; that B., the defendant, was desirous of renting the farm from V., and had applied to and requested A. to surrender and relinquish possession thereof to V., and to endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A. ; and that, in consideration that A. would surrender and relinquish possession of the farm to V., and would also apply to V., and endeavour to prevail upon him to accept of such surrender, and to accept B. as tenant in lieu of the plaintiff, B. promised to pay A. 100*l.* when he should become such tenant : it then averred that A. did surrender and relinquish, &c., and did apply to and endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A. ; and that V. accepted the surrender, and accepted

1855.

 SMART
 v.
 HARDING.

1855.

SMART
v.
HARDING.

B. as tenant; but that B. refused to pay the 100*l.*: and it was held, that this was a contract for an interest in or concerning lands, and therefore that the special count could only be proved by a note or memorandum in writing, in conformity with the 4th section of the statute of frauds. A similar decision was come to in *Kelly, App., Webster, Resp.*, ante, Vol. XII, p. 283. There, in consideration that A., who was tenant of a messuage and premises under a parol agreement for a seven years' lease, would give up the immediate possession thereof to B., in order that B. might enter thereon as tenant, and also as a compensation for certain improvements made by A. on the premises, and for the value of certain articles left thereon by A.,—B. agreed to pay A. 100*l.* A. accordingly relinquished and gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.; and B. afterwards, in part performance of agreement on his part, paid A. 5*l.* In an action brought by A., in the county-court, to recover the balance of the 100*l.*, the judge ruled that the contract in respect of which the plaintiff sued was *not* a contract for the sale of an interest in or concerning lands, within the 4th section of the 29 Car. 2, c. 3, but this court, on appeal, reversed his decision, on the authority of *Cocking v. Ward*. [*Maule, J.* The only difference that I can discover between *Cocking v. Ward* and the present case, is, that there was in that case a stipulation in the agreement that the plaintiff would endeavour to induce the landlord to accept the defendant as tenant in lieu of himself.]

JERVIS, C. J. I am of opinion that the rule to enter a nonsuit in this case ought to be made absolute, on the ground that the contract was for an interest in or concerning lands, within the meaning of the 4th section of

the statute 29 Car. 2, c. 3, and is not in writing. To ascertain what was the nature of the contract, we must look, not at the declaration only, but to the evidence also upon the subject. Nobody can doubt that the plaintiff, being tenant from year to year of the premises where he carried on his business, agreed to assign his interest therein to the defendant. The case is clearly within the mischief of the statute, and, if necessary, also within the authority of *Cocking v. Ward*. The only real distinction between that case and the present is rather against Mr. Temple: there, the plaintiff announced to the defendant that he had not an interest which he could legally part with to him; here, however, the plaintiff expressly agrees to "yield up the possession and occupation of the premises to the defendant, and to permit him thenceforth to occupy the same."

1855.

SMART
v.
HARDING.

MAULE, J. I entirely agree with my Lord that this rule must be made absolute to enter a nonsuit; and I do this without the least doubt or hesitation. The case is a stronger one than *Cocking v. Ward*, inasmuch as here the plaintiff contracts absolutely to assign, whereas there the contract was to assign subject to the consent of the landlord.

CRESSWELL, J. I am entirely of the same opinion.

WILLIAMS, J. I am of the same opinion. This clearly was a contract for an interest in or concerning lands.

Rule absolute accordingly.

1855.

Jan. 24.

The plaintiff brought an action for 12*l.* 5*s.* 7½*d.*, for goods sold and delivered. The defendant paid 10*l.* on account, and before declaration took out a summons calling on the plaintiff to shew cause why the proceedings should not be stayed on payment of the further sum of 6*s.* 4½*d.* and costs. The plaintiff claiming more, no order was made. A declaration was afterwards delivered, and the defendant paid 7*s.* into court, which the plaintiff accepted:—Held, —*dissentiente Creswell, J.*,—that the plaintiff's acceptance of 7*s.*, after his refusal of 6*s.* 4½*d.* did not disentitle him to the costs incurred subsequently to the offer.

SHAW v. HUGHES.

THIS action, which was commenced on the 25th of September, 1854, was brought to recover 12*l.* 5*s.* 7½*d.* for ironmongery goods supplied by the plaintiff, who resides and carries on business at Birmingham, to the defendant, a builder, who resides and carries on his business at Liverpool. Shortly after the service of the writ of summons, viz. on the 7th of October last, the defendant paid to the plaintiff 10*l.* on account of debt and costs, the defendant at the same time objecting, that, of seven bags of nails charged to him in February, 1852, three had never reached him.

On the 13th of October, 1854, a summons was taken out on the part of the defendant calling upon the plaintiff to shew cause why, upon payment of 6*s.* 4½*d.* for debt, together with the costs of the writ, all further proceedings in the cause should not be stayed. The plaintiff claiming more than the sum offered, no order was made.

The declaration was delivered on the 24th of October. On the 7th of December, the defendant pleaded,—first, *nunquam indebitatus*, as to all but 10*l.* and 7*s.*,—secondly, payment of 10*l.* after action brought,—thirdly, payment of 7*s.* into court. The plaintiff entered a *nolle prosequi* as to the first plea, confessed the second plea, praying judgment for his costs, and replied to the third plea by accepting the money paid into court, and praying judgment for his costs.

The plaintiff's costs were subsequently taxed at the sum of 8*l.* 9*s.*, after allowing the defendant 10*s.* for the costs of his first plea, and judgment was signed, and a *fi. fa.* issued on the 14th of December, and the amount levied.

On the same 14th of December, a summons was served upon the plaintiff's attorney, calling upon the plaintiff to shew cause "why the master should not be at liberty to review his taxation of the plaintiff's costs, and to disallow the plaintiff's costs subsequent to the return of the summons of the 13th of October, and to tax and allow the defendant his costs subsequent to that period; and why such last-mentioned costs, when ascertained and taxed, should not be paid by the plaintiff to the defendant, after deducting therefrom the plaintiff's costs; and why in the meantime all further proceedings in this cause should not be stayed." This summons was heard before Cresswell, J., on the 16th of December, and an order made in the terms thereof.

1855.

 SHAW
 v.
 HUGHES.

The defendant's costs were subsequently taxed at 9*l.* 7*s.* 4*d.*, out of which sum the plaintiff was allowed 2*l.* 13*s.* 6*d.* for his costs to the time of the defendant's offer to pay the 6*s.* 4½*d.*; and the difference, 6*l.* 13*s.* 10*d.*, was paid by the plaintiff on the 19th of December.

Upon affidavits disclosing the above facts, and further stating that the plaintiff had declined at first to accept the 6*s.* 4½*d.* offered, in the belief that he should be able to establish his entire claim; but that, finding he should require the evidence of two persons who had since the delivery of the goods left his employ, and that the expense of obtaining their attendance would be considerable, he ultimately consented to take the 7*s.* out of court,

C. Wood, on a former day in this term, obtained a rule calling upon the defendant to shew cause why the order of Cresswell, J., of the 16th of December last, should not be rescinded, and why the master should not be at liberty to alter his allocatur for the plaintiff's costs upon the judgment to the amount at which the same were taxed prior to the said order; and why the defendant should not forthwith re-pay to the plaintiff or his attorney the sum of 6*l.* 13*s.* 10*d.*, the

1855.

 SHAW
 v.
 HUGHES.

amount of the defendant's costs taxed and paid pursuant to the said order; and why the defendant should not pay to the plaintiff or his attorney his costs incurred subsequently to the said judgment, with the costs of the application.

C. Pollock now shewed cause, upon an affidavit stating, amongst other things, that the 7s. was paid into court under the advice of counsel, and not because the plaintiff was entitled to more than the 6s. 4½d. originally offered. The rule upon this subject is well laid down in *Fisher v. Pyne*, 1 Man. & G. 265, where it was held that a plaintiff who, in one stage of an action for unliquidated damages, refuses to accept from the defendant, in satisfaction of the suit, a sum which he afterwards takes, is not entitled to the costs incurred after the refusal. In giving judgment, Tindal, C. J., says: "It is an established rule, that, where a specific sum has been tendered and refused, and the plaintiff recovers no more than was tendered, he is not entitled to the costs incurred subsequently to the tender and refusal; and, according to one case, the plaintiff would have to pay the costs incurred by the defendant after that period." In a note to that case,—1 M. & G. 273,—it is said: "In *Ackwood v. Read*, 7 Dowl. P. C. 810, the rule deducible from the case of *James v. Raggett*, 2 B. & Ald. 776, 1 Chitt. Rep. 471, is stated by Parke, B., to be this, 'that, wherever a plaintiff refuses a sum of money tendered, through the medium of a summons, in satisfaction of the debt for which the action is brought, and afterwards takes out of court the same sum, when paid in under a plea, it is a *prima facie* case that he continued the suit for the purpose of making costs, and consequently he ought to pay costs from the time of his refusal.' The learned judge goes on to say, 'But good cause may be shewn to rebut this inference, and, in the present action, which is not brought for a debt, but to recover damages, even sup-

posing a *prima facie* case to have been made against the plaintiff, he has satisfactorily answered it by shewing that he had not ascertained at the time the sum of 10*l.* was tendered, nor until after the defendant had pleaded, the precise amount of injury done, and that he then found the difference between the two sums so trifling as not to be worth his while proceeding for.'” And the reporters refer to several other authorities as elucidating the same doctrine. (a) The ground upon which the rule proceeds, is, that the conduct of the plaintiff in proceeding after the offer, is oppressive and vexatious. [*Jervis*, C. J. No case has decided that the plaintiff is not entitled to costs, where a larger sum has been paid into court than that which was offered and refused.] Here, the sum offered was 6*s.* 4½*d.*; the sum paid into court was 7*s.* Is the defendant to pay costs because he has paid into court 7½*d.* more than he had offered? [*Maule*, J. It is safer to adhere to the rule, than to introduce novelty. If your argument were to prevail, we should be called upon to inquire in all cases what is a large and what a small addition.] The question is, whether the plaintiff did not substantially refuse to take the sum he has now thought fit to accept. [*Maule*, J. The inquiry you propose, is, whether, under all the circumstances of the case it was not reasonable that the defendant should pay the larger sum into court, without prejudice to his rights as to being relieved from costs. That, as it strikes me, would be a very troublesome, inconvenient, and expensive innovation.]

Wood was not required to support his rule.

1855.

 SHAW
v.
HUGHES.

(a) *Vane v. Meckell*, Barnes, 284; *Hartley v. Bateson*, 1 T. R. 629; *Zeevin v. Cowell*, 2 Taunt. 203; *Roberts v. Lambert*, 2 Taunt. 293; *Sawbridge v. Coxwell*, 4 Taunt. 255; *Gibbon v. Copeman*, 5 Taunt. 840, 1 Marsh. 392; *Last v. Benton*, 2 Marsh. 478, and *Burmesler v. Hilch*, 13 East, 551.

1855.

SHAW
v.
HUGHES.

JERVIS, C. J. I am of opinion that this rule should be made absolute. The general rule undoubtedly is, that, where a plaintiff has taken out of court a sum which had been offered to him by summons at an earlier stage of the cause, and refused, he is not entitled to the costs subsequently incurred. That rule, no doubt, is open to some exceptions. Now, what are the circumstances of this case? The plaintiff brought his action to recover a sum of 12*l.* 5*s.* 7½*d.* The defendant paid 10*l.* on account, and afterwards took out a summons calling upon the plaintiff to shew cause why the proceedings should not be stayed on payment of 6*s.* 4½*d.* as the balance of the debt, together with the costs. This sum the plaintiff declined to accept, alleging that he was entitled to more. The cause proceeds, and the defendant pays 7*s.* into court. The plaintiff, finding he could not prove his whole demand, takes the 7*s.* out of court. I see no reason why he should, under these circumstances, be deprived of the costs incurred up to the time of taking the money out of court.

MAULE, J. I am of the same opinion. An action is brought to recover 12*l.* 5*s.* 7½*d.* for goods sold and delivered. The defendant pays 10*l.* on account, and afterwards takes out a summons to stay proceedings upon payment of the further sum of 6*s.* 4½*d.* and costs. The plaintiff, claiming more, refuses to accept that sum; and the defendant pleads, and pays 7*s.* into court; the plaintiff takes it out. The defendant now says that the plaintiff ought to be deprived of his costs incurred subsequently to his refusal to accept the 6*s.* 4½*d.*, because he afterwards thought fit to take that sum plus 7½*d.* The plaintiff says, my reason for going on after the offer of 6*s.* 4½*d.*, was, not that I was proceeding for the 7½*d.*, but that I knew that I had a larger sum due to me from the defendant; but afterwards finding, on

inquiry, that, by reason of the absence of witnesses, I should have a difficulty in proving my demand upon the issues as then joined, I determined to proceed no further, and took out the 7s. Does that state of things shew any oppression on the part of the plaintiff? I think not. It may be that the defendant knew the difficulty the plaintiff was in, and therefore paid the money into court. Without, therefore, saying that there might not be a case of oppression such as would justify us in treating it as an exception to the general rule, it is enough to say that this is a case to which the rule should apply. To inquire whether the sum ultimately accepted is *substantially* the sum which was offered, would be to introduce in many cases a very inconvenient discussion. The object of the rule, is, the diminution of costs. To adopt the suggestion of Mr. Pollock would lead to the institution of proceedings of a nature materially to aggravate the costs, and to make decisions uncertain. The ordinary rule is, that, if more (whether by a larger or a smaller sum) is paid into court than the amount offered and refused, the plaintiff does not by taking the money out of court deprive himself of his right to costs up to that time.

1855.

 SHAW
v.
HUGHES.

CRESSWELL, J. I for one should have no objection to establish it as an inflexible rule, that, to disentitle a plaintiff who refuses to accept a sum offered on summons to the costs subsequently incurred, where he afterwards elects to take money out of court, the sum so taken out shall be the precise sum offered, or less. But, finding that a party plaintiff may shew circumstances to exonerate him from the penalty of the loss of costs in such a case, I thought, and still think, that it would be but equal justice to allow the defendant to enter into a similar inquiry. It seemed to me that the sum ultimately accepted by the plaintiff was accepted by him in satis-

1855.

SHAW
v.
HUGHES.

faction of the same part of his demand as the sum originally offered and declined. I thought there was enough to shew that the plaintiff had not proceeded as if he intended to bring his case into court. He must have known all the difficulties in the way of his establishing his demand, at the time he refused to receive the 6*s.* 4½*d.* He evidently went on in the hope that the defendant would yield. I think this rule ought to be discharged.

WILLIAMS, J. I agree with my Lord and my Brother Maule, though not, I must confess, without some difficulty. The courts have thought themselves justified in depriving a plaintiff of costs, and sometimes making him pay the defendant's costs, where he has proceeded oppressively and vexatiously for the mere purpose of making costs. It is clear that this case is not strictly within the rule which deprives the plaintiff of costs where he has ultimately taken out of court a sum which in an earlier stage of the cause he had declined to accept. But there does seem to be something like evidence, if not of oppressive conduct, at least of a want of due caution and circumspection on the part of the plaintiff.

Rule absolute.

1855.

HARNOR v. GROVES.

Jan. 16.

THIS was an action for a breach of warranty on a sale of flour.

The first count of the declaration stated, that, on the 15th of January, 1854, it was agreed between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy and accept of the defendant, twenty-five sacks of flour *of the same quality as certain flour which the defendant had then lately sold and delivered to one Mackness*, at and for the price or sum of 68s. per sack: Averment, that the plaintiff was ready and willing to buy and accept and to pay for the same flour, and that he had done all things necessary on his part to entitle him thereto, and that a reasonable time for the sale and delivery thereof had elapsed: Yet that the defendant delivered to the plaintiff as and for the flour so contracted to be sold and delivered, certain flour not of the same quality as the flour which he had so sold and delivered to Mackness, but of a much worse and less valuable quality, and for which the plaintiff paid the said contract price, believing it to be the flour so contracted to be sold; and which flour was wholly valueless and useless to the plaintiff.

The second count stated that the defendant, by warranting certain flour to be of the same quality as certain other flour which the defendant had then lately sold to Mackness, sold the same to the plaintiff; yet that the said flour was not of the same quality as the flour which the defendant had then lately sold to Mackness, &c.

The declaration also contained counts for money had

In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent at the time of the sale represented the goods to be of a particular quality.

The vendee of goods who has used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract, and recover back the price.

1855. and received, and for money found due upon accounts stated.

HARNOR
v.
GROVES.

The defendant pleaded,—first, that it was not agreed between the plaintiff and the defendant in manner and form as in the first count alleged,—secondly, that he did not warrant the flour as in the second count alleged,—thirdly, to the common counts, never indebted. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were as follows:—The plaintiff was a baker, and the defendant a flour-factor. On the 16th of January, 1854, the plaintiff met one Howard, an agent of the defendant's, at the shop of one Mackness, who also carried on the business of a baker, when Howard offered to sell the plaintiff some flour, *which he represented to be of the same quality as some that he had recently sold to Mackness*, and which had given satisfaction. No bargain was then made: but, in the evening, Howard called on the plaintiff and renewed his offer, repeating the representation as to the quality of the flour which he had made in the morning. The plaintiff thereupon agreed to buy twenty-five sacks, at 68s. per sack; and, on the morning of the 17th, the plaintiff received from the defendant the following contract-note:—

“January 16th, 1854.

“Mark Lane, 47 Stand.

“Sold Mr. W. Harnor, per Mr. Howard, twenty-five sacks Whites, X S., at 68s. per sack, net.

“J. T. Groves.”

The flour was delivered on the 18th of January, and paid for. The plaintiff used half a sack of it, and, finding it not to be what Howard had represented, he called upon the defendant to complain, when the defendant admitted it was not the same mark as the flour sold

to Mackness, and stated that he had not authorised Howard so to represent, that particular parcel having been all disposed of. After this, the plaintiff used two sacks more of the flour, and sold one sack.

1855.

HARNOR
v.
GROVES.

Mackness, who was called as a witness, stated that the flour in question was not so good by 5s. a sack as that which he had bought of Howard; and that the flour supplied to him was described as X S S., which he understood to mean "extra *super* superfine," whereas X S. denoted a lower quality, "extra superfine."

On the part of the defendant it was insisted that the written contract alone must be regarded as the contract between the parties, and that parol evidence was not admissible to introduce a warranty inconsistent therewith. It was further insisted that the defendant was not bound by a misrepresentation made by Howard at the time of making the contract.

Two questions were left to the jury,—first, whether or not Howard, at the time of the sale, warranted the flour to be equal to Mackness's,—secondly, whether he had authority so to do.

The jury found both questions in the affirmative, and his Lordship accordingly directed a verdict to be entered for the plaintiff for 6*l.* 5*s.*, the difference between the contract price and the value of the flour according to the evidence: and leave was reserved to the defendant to move to enter a nonsuit or a verdict for him on all or either of the counts as the court might think him entitled.

Willes, in Michaelmas Term last, obtained a rule nisi accordingly. He submitted, that, the contract between the parties having been reduced into writing, evidence of a warranty such as that suggested was not admissible: and he referred to *Greaves v. Ashlin*, 3 Campb. 426, where, a written contract for the sale of oats specifying

1855.

HARNOR
v.
GROVES.

no time for their delivery, in an action for not delivering them, evidence was offered to shew that the defendant's agent had verbally made it a condition of the sale that the plaintiff should take away the oats immediately: but Lord Ellenborough "was of opinion that it was not competent to the defendant to give such evidence, as it materially varied the contract, which had been reduced into writing; and he cited *Meres v. Ansell*, 3 Wils. 275. His Lordship was likewise of opinion that a witness could not be asked whether, according to the usage of the corn-market, if corn be sold, to be delivered at a distant day, the time should not be inserted in the contract; as that was only an indirect method of giving parol evidence to vary the written contract." He also referred to *Meyer v. Everth*, 4 Campb. 22, where it was held, that, where, upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale-note which does not refer to the sample, this is not a sale by sample; and, if the goods turn out to be of inferior quality, the purchaser's remedy is, by an action on the case for a deceitful representation. Lord Ellenborough there, on its being stated that a sample was exhibited at the time of sale, and a representation made that the bulk equalled the sample, —said: "You should have declared in case for a deceitful representation. It was no part of *the contract*, that the sugar should be equal to the sample. Where goods are sold in this way, I think evidence might be admissible to shew, that, at the time of the sale, a sample was fraudulently exhibited, to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity, which turned out of greatly inferior quality and value. But, when the sale-note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would be contrary to *Meres v. Ansell*, and would amount to an admission of parol evidence to contradict a written

document. In truth, this was not a sale by sample; and the sample can only be used as evidence of a deceitful representation."

1855.

HARNOR
v.
GROVES.

Shee, Serjt., and *Prentice*, now shewed cause. This is not the case of a sale by sample. The bargain between the plaintiff and Howard, the defendant's agent, was made upon a representation by Howard that the flour sold to the plaintiff was of the same quality as that which had been sold to Mackness, and the quality of which was known. That bargain was complete on the 16th of January. The note relied upon by the defendant, and which was sent to the plaintiff next day, was in truth not the contract at all. [*Cresswell*, J. Is it not common to admit evidence of a parol warranty, where a horse is sold with a written pedigree?] No doubt it is. [*Cresswell*, J. It would seem from the evidence that the letters X S., and X S S., have a known meaning in the trade.] The plaintiff does not seek to contradict the contract: but the question is, which is the contract? [*Maule*, J. The written paper which describes the terms upon which the flour was sold.] What the defendant chose to call it, was immaterial to the plaintiff, so long as he received flour which was equal in quality to Mackness's flour. [*Maule*, J. Howard's representation was no part of the contract.] The plaintiff undoubtedly had a right to repudiate the flour. [*Maule*, J. In respect of its not being conformable with the verbal representation, or with the contract note?] In respect of its differing in quality from that which the defendant's agent contracted to sell him. [*Maule*, J. This was not a contract for the sale of a specific article. If the flour delivered answered the description in the contract-note, the plaintiff cannot complain. *Jervis*, C. J. The plaintiff had no means of knowing that X S. was not a fair representation of the flour as being equal in quality

1855.

HARNOR
v.
GROVES.

to that which Howard had sold to Mackness. *Maule*, J. It cannot, under the circumstances, be said that the note described a contract different from that which the parties intended to be bound by.] The plaintiff was entitled to shew what the real contract was. In *Syers v. Jonas*, 2 Exch. 111, which was an action for the price of tobacco sold, it was held that evidence was admissible to shew, that, by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes. Parke, B., there says: "There is no doubt, that, in mercantile transactions, and others of ordinary occurrence, evidence of established usage is admissible, not merely to explain the terms used, but to annex customary incidents. In the case of *Hutton v. Warren*, 1 M. & W. 466, the law on this subject was laid down fully, and the limitations pointed out. Such usage is admissible when it is not expressly or impliedly excluded by the terms of the written instrument. The question, then, is, whether by implication that usage is excluded in this case. For the purposes of the argument, it must be assumed, that, in the tobacco trade, whenever a sale of tobacco took place, and the bought-note was silent on that subject, and when samples were delivered, it was the prevailing usage that the vendor was understood to agree that the bulk should correspond with them. This undoubtedly amounts to a parol warranty or agreement that the bulk should correspond with the sample." [*Cresswell*, J. All that that amounts to is, that, by the usage of the particular trade, all contracts are to be read as if they contained that warranty.] At all events, the plaintiff was entitled to recover the value of that portion of the flour which he had not used, as money paid under a mistake of fact.

Willes, in support of the rule. The third count is out of the question. Possibly the plaintiff might have

repudiated the contract, on discovering that the flour was of inferior quality. But having, after trying it, and complaining of it, chosen to use a portion of it, and to sell another portion, he has precluded himself from returning any part of it, and therefore cannot recover back the price: *Chapman v. Morton*, 11 M. & W. 534, settles that point. The representation made by Howard was no part of the contract, and did not amount to a warranty. *Simplex commendatio non nocet*. This is not like the case of *Syers v. Jonas*: a warranty of the quality of the article sold, is not one of those "customary incidents" which are by the usages of trade to be tacitly incorporated into the contract. *Greaves v. Ashlin*, 3 Campb. 426, and many other cases, shew that parol evidence is not admissible to control the written Contract in the way that is sought to be done here.

1855.

HARNOR
v.
GROVES.

JERVIS, C. J. I am of opinion that the rule must be made absolute to enter a nonsuit. The plaintiff clearly cannot recover upon the count for money had and received. When he found that the flour was not of the quality described in the contract, he might have repudiated it at once. Instead of doing so, he uses two sacks of it, and sells one. That was such a dealing with it as to preclude him from afterwards rescinding the contract. Then, as to the other counts, the question depends upon whether or not the article delivered corresponded with the contract. The contract here is the note in writing; for, if the plaintiff had intended to say that that note did not truly represent the real bargain, inasmuch as it omitted the warranty that the flour should be equal in quality to that sold to Mackness, he should immediately have returned the note. Instead of doing so, he takes it without that warranty, and so adopts the contract as a contract made without the qualification. The defendant, therefore, has contracted

1855.

HARNOR
v.
GROVES.

simply to deliver "twenty-five sacks X S. whites," and he has delivered flour of that description. I therefore think the plaintiff is not entitled to recover on either of the counts.

MAULE, J. I am of the same opinion. As to the count for money had and received, I agree with my Lord Chief Justice, that, if the plaintiff ever had a right—which I by no means admit that he had,—to repudiate the contract, he precluded himself from so doing by the mode in which he dealt with the flour after it had been delivered to him. As to the first count, which alleges the agreement to be that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy of the defendant, twenty-five sacks of flour *of the same quality as certain flour which the defendant had then lately sold to one Mackness*,—The contract between the parties was reduced into writing: and the rule is, that, where a contract, though completely entered into by parol, is afterwards reduced into writing, we must look at that, and at that alone, even though part of the terms previously agreed upon are not inserted in the written contract. It is by the written contract alone,—subject, of course, to be interpreted by the usages of trade, as in *Syers v. Jonas*,—that the parties are bound. And more especially is that so in a case where, as here, the contract is one which by the statute of frauds is required to be in writing. The object of that statute, as appears from its title and preamble, was, to prevent frauds and perjuries; the legislature knew that parties who make bargains with each other often take very different views of them; and therefore they provided, in order to remove the temptation as much as possible, that, in cases of contracts for the sale of goods exceeding the value of 10*l.*, the contract, or some note or memorandum thereof, shall be in writing. The in-

tention of the legislature was, that the writing should be the evidence, and the only evidence, of the contract, and that there should be no occasion to look beyond it. The usages of trade form the exception, because parties are supposed to contract with reference to them. Here, however, the plaintiff seeks to introduce into the contract a special stipulation as to which the writing is altogether silent, and which has no reference to any usage of trade. That would be introducing the very mischief which the statute of frauds intended to prevent.

1855.

HARNOR
v.
GROVES.

CRESSWELL, J. I am entirely of the same opinion upon both points. The count for money had and received fails, because the plaintiff has accepted the goods, and used part and sold other part, after a discussion as to whether or not they answered the contract, and after he had paid the price. After that, he cannot be allowed to repudiate the contract. As to the other point, whatever passed between the plaintiff and Howard at the time the bargain was made, the parties must be bound by the contract which was afterwards reduced into writing. Parol evidence clearly was not admissible to introduce the term which the plaintiff sought to introduce.

WILLIAMS, J. I am of the same opinion. The plaintiff is in effect seeking to treat as the contract that which passed between him and the defendant's agent before the contract was actually entered into. The parties are bound by the written note, and cannot be allowed to vary its terms by parol evidence in the way suggested.

Rule absolute for a nonsuit.

1855.

BAMBERGER and Another v. THE COMMERCIAL CREDIT
MUTUAL ASSURANCE SOCIETY.

Jan. 23.

The rules of a society established for the mutual assurance of traders against bad debts, after stipulating for the payment of premiums, provided, amongst other things, that, "if the premiums on any policy should not be paid within fifteen days after the same should fall due, the directors might, with the approbation of the council, either declare such policy void, or enforce the payment of such premiums."

In a declaration on a policy, the plaintiffs averred that they had done all things neces-

THIS was an action upon a policy of assurance against commercial losses.

The declaration stated, that, on the 10th of February, 1853, a policy of assurance was made by and between the plaintiffs and the defendants, in the words and figures following, that is to say,—“This policy, made the 10th day of February, 1853, between the Commercial Credit Mutual Assurance Society of the one part, and David Bamberger and Louis Bamberger of, &c., (hereinafter called the assured) of the other part: Whereas the said assured have represented themselves to the said society to be traders carrying on the trade or business of importers of continental produce and manufactures: And whereas the said assured have proposed that the said society shall give them such guarantee against losses which they may sustain in their said trade or business, or any of them, from the non-payment by debtors, as hereinafter mentioned: And whereas the said assured have delivered at the office of the society a declaration or statement in writing, dated

sary on their part, and had been ready and willing to do all things according to the said policy, rules, and regulations, which it was necessary that they should be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle them to be paid by the society the loss thereafter mentioned, and that a reasonable time for payment thereof had elapsed. It then went on to aver that a loss had been incurred, and that the defendants refused to pay:—Held, that this general averment was sufficient, without shewing the various steps required by the rules of the society to entitle the assured to recover a loss.

The defendants pleaded, that, after the making of the policy, and more than fifteen days before the commencement of the suit, a certain premium became payable by the plaintiffs and was not duly paid, whereupon the directors of the society, with the approbation of the council, cancelled the policy, and declared the same void, whereof the plaintiffs had notice:—Held, that the plea disclosed a sufficient answer to the plaintiffs' claim.

the 10th of February, 1853, and signed by the said assured, and have thereby declared, amongst other things, that the total of the returns during the year ending on the 31st day of December, 1852, of their aforesaid trade or business, amount to the sum of 12,000*l.*, and they propose to effect an insurance with the society on returns amounting in the whole to the sum of 12,000*l.*, the particulars whereof are set forth in the 'Table of Particulars of Returns' prefixed hereto; and the said assured have thereby agreed that the said declaration and proposal should form the basis of the contract between them and the society: And whereas the said assured have this day paid to the said society the sum of 12*l.*, being the amount of management commission, which, according to the rules and regulations of the society, ought now to be paid to the society, the receipt of which said sum of 12*l.* is hereby acknowledged; Now these presents witness, that, in consideration of the said sum of money already paid, and of the further sums of money hereafter to be paid to the society, as hereinafter mentioned, the society doth hereby agree and declare with and to the said assured, their executors, administrators, and assigns, and, in consideration of the agreement hereby entered into by the society, the said assured do hereby, for themselves, their heirs, executors, and administrators, agree and declare with and to the society in manner following, that is to say,—

"1. That the said assured shall pay to the society, by way of management commission, the sum of 9*l.* on the 1st of March, 1854, and the like sum on the 1st of March in every subsequent year until this agreement shall be determined in manner hereinafter mentioned:

"2. That the said assured shall pay to the said society, by way of premium, in respect of their aforesaid trade or business, the sum of 35*l.* on the 1st of June, 1853, and the sum of 42*l.* on the 1st of December, 1853, and

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

the sum of 42*l.* on the 1st of June and 1st of December in every subsequent year until this agreement shall be determined in manner hereinafter mentioned ; subject, nevertheless, to such deductions in respect of such payments, and to such right of set-off, as is provided by the said rules and regulations ;

“3. That it shall be lawful for the said assured, their executors or administrators, to determine this agreement on the 31st of December, in the year 1856, or in any subsequent year, upon giving to the manager of the society for the time being at least six weeks’ previous notice in writing of their intention so to do :

“4. That the premium and reserved funds of the society mentioned in the said rules and regulations, shall be liable, in the manner and to the extent mentioned in such rules and regulations, to reimburse and pay to the assured, their executors, administrators, or assigns, such sum or sums of money as shall from time to time be awarded to the said assured by the council of the society, in respect of the losses which may arise to the said assured from the bonâ fide sale and delivery (during the continuance of this agreement) of goods for purposes of trade to debtors being at the time of such sale and delivery traders within the meaning of the laws for the time being in force relating to bankrupts ; and that the said assured shall receive such payment and reimbursement at the times, in the manner, and subject to the conditions and stipulations mentioned and set forth in the said rules and regulations :

“5. That the said assured shall in all respects observe, perform, and abide by all and singular the rules and regulations of the society as established and laid down in the deed of settlement thereof, and in particular those of such rules and regulations which are hereon indorsed, and which on the part and behalf of the assured are and ought to be observed and performed :

"6. That the said premium and reserved funds alone shall be liable to answer and make good to the assured all claims and demands whatsoever under or by virtue of this agreement; and that no director or shareholder shall be in any case personally liable or subject to any such claims or demands, nor be in any wise charged by reason of this or any other instrument of assurance: In witness whereof the said society hath caused to be affixed hereto its common seal, in the presence of the directors whose names are hereunder written; and the said assured have hereunto set their hands."

Averment, that the rules and regulations indorsed on the said policy were in the words and figures following, that is to say,—

"28. All policies shall be determinable on the 31st of December in any year, upon notice in writing to that effect given at least six weeks previously, by the assured, or his representatives, to the directors, and not otherwise: provided that no policy shall be determined in manner aforesaid, until it has continued in force for three full years at least, unless in the case of the death of the assured, or of his or their dissolving partnership, or ceasing to carry on business, or unless (with the consent of the directors) for the purpose of effecting a new policy for the ensuing year, where the assured has declared the returns of his business at too large an amount:

"31. In the event of the assured having declared too small a sum as a total returns of his business, a supplemental policy shall be taken out by him, for such additional sum as may be requisite:

"33. That the rate of premium to be paid shall be regulated by the table of classes annexed, so far as such table provides for the same:

"34. That the assured who declares for 50,000*l.* and upwards, may, by special arrangement, insure at a rate of premium amounting to 10 per cent. less than the

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

average per centage of his annual losses during the previous five years :

“ 35. After providing for the payment of the admitted claims of any year out of the premiums of that year, the surplus, if any, shall, on and after the 31st of December, 1854, be applied as follows,—first, one moiety of such surplus shall be added to the reserved fund,—secondly, the other moiety of such surplus shall be divided amongst the then holders of policies who have been assured for two years at least, in proportion to the amount of premium payable, after deducting therefrom all losses admitted to such assured respectively ; and the proportion of such moiety so accruing to each of such assured, shall be applied by the society as a set-off against the then next yearly premium payable by such assured : provided always that no assured shall be entitled to a larger amount of such surplus by way of set-off than would reduce the balance of premium to the sum produced by the lowest rate payable according to the classification of his policy ; and, if his share in such surplus should amount to more than sufficient for such purpose, then any excess beyond that amount shall be added to the reserved fund :

“ 36. Whenever the reserved fund shall amount to 100,000*l.*, the whole surplus of the premium fund for the current year shall be applied in accordance with and subject to the second limitation of Art. 35 :

“ 37. Where the admitted claims of any assured shall in any one year equal three times the amount of the premium to be paid, the premium for such year shall be increased after the rate of 25 per cent. on such premium ; and, if such loss shall equal six times the amount of such premium, then after the rate of 50 per cent. ; and so on in like proportion :

“ 38. The premium for every complete year ending the 31st day of December, shall be paid by half-yearly payments. All payments of premiums shall be made on

the 1st day of June and the 1st day of December, except that, when a policy is effected between the 15th day of March and the 1st day of December, the whole of the proportionate premium up to the 31st day of December next following shall be paid on the 1st day of December; and that, when the policy is effected between the 1st day of December and the 31st day of December, the proportionate premium up to such 31st day of December shall be paid on the day of the date of the policy:

"39. Every policy dated on or between the 1st and 15th of any month, shall have the proportionate premium up to the 31st day of December next ensuing calculated from the 1st day of such month; and any policy dated on or between the 16th and the last day of each month, shall have such proportionate premium calculated from the 16th day of such month:

"40. Those of the assured who during the year have had claims for losses admitted by the society prior to the premiums for such year falling due, shall be entitled to set off such admitted claims against such premiums:

"41. If the premium on any policy shall not be paid within fifteen days after the same shall fall due, the directors may, with the approbation of the council, either cancel and declare such policy void, or enforce the payment of such premium:

"42. In any case of loss, the assured is required to send in his claim to the directors within ten days from the date of the occurrence of such loss, and to state the grounds on which such claim is made, and whether he is or is not assured in any other society on account of such loss: and the assured shall furnish with such claim,—(a) An invoice of the goods sold, in reference to the non-payment for which the loss is claimed, with the date of sale,—(b) An account current shewing all the transactions between the assured and the debtor, com-

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

mencing at least six months prior to the delivery of such goods, and continued down to the date of making such claim,—(c) All documents tending to establish the debts, and all securities (if any) given by the debtor on account thereof,—(d) An authority to the society to act in the name of the assured against such debtor :

“43. Any loss shall be considered to have occurred, by the debtor having become bankrupt, insolvent, or called a meeting of his creditors, or suspended payment, or ceased to carry on business :

“44. The directors shall cause all claims for losses to be examined into and specially reported on, and shall refer the same to the council at their next ordinary meeting ; and the council shall as speedily as possible either admit such claims, or any part thereof, or refer them to the decision of the half-yearly meeting of the council ; and the officers or clerks who have investigated such claims, shall attend all meetings of the council, and give such explanation thereof as may be necessary :

“45. When any claim shall have been referred to such half-yearly meeting as hereinbefore provided, the assured shall have at least ten days’ notice of such meeting, and shall be at liberty to attend such meeting either personally or by proxy ; and the council shall forthwith at such meeting decide upon the admission or rejection of the whole or any part of the claim so referred ; and by the decision of the council the assured shall be absolutely bound and concluded in the matter of such claim :

“46. When any claim has been so rejected, the assured shall be at liberty to withdraw all the documents and securities referred to in Art. 42, upon payment of any expenses incurred by the society in proceeding against his debtor under the authority named in such last-mentioned article :

“47. All claims admitted by the council shall be paid

by the directors out of the premium fund of the year in which such claims shall have been made; and the accounts of the society shall be annually balanced up to the 31st of December in each year: and, where any claims have been admitted before the 16th of May in any year, the directors shall make such payment on account of such claims as shall have been recommended by the council, provided that such payment is not more than 40 per cent. on the amount thereof; and such payment shall be made on or before the 31st of July following; and all other claims admitted during the remainder of the year, together with the balance of the claims first mentioned, shall be paid on or before the 31st of January following:

“48. If, in any one year, the premium fund shall not equal in amount the sums payable on account of claims admitted, the reserved fund shall be charged with the deficiency, to the extent of a moiety of such fund:

“49. If the premium fund, together with such moiety of the reserved fund, be not sufficient to pay in full the respective amounts payable to the assured for such year, then the assured shall only be entitled to be paid such rateably reduced proportion of such amounts as the total of the premium fund and such moiety of the reserved fund will produce; but, in every such case, if the society has received, or thereafter may receive, any sum due to any assured from any debtor through whom any loss has arisen in such year, the person assured shall be entitled to such sum, subject to such deduction as is hereinafter mentioned, until he has received the full amount payable to him by the society:

“50. Whenever the society shall receive from the debtor the sum due, or any portion thereof, then an amount equal to the sum recovered, but subject to such deduction as is hereinafter mentioned, shall be forthwith paid to the assured, and shall be considered as paid on

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

account of any claim which may be admitted by the council in reference to such debt :

“51. In order to guard against undue speculations on the part of the assured, it is provided,—(a) That the total amount of claims in favor of any assured in any one year shall be limited to one tenth of the total amount of the annual returns upon the face of his policy or policies,—(b) That any claim made in respect of losses arising from the non-payment of one person or firm only, shall be admitted only to the extent of a moiety of the total amount which any assured is entitled to have in any one year,—(c) That, under any circumstances whatever, such last-mentioned admitted claim shall be limited to the sum of 3000*l.*,—(d) That, in order to make every assured his own assurer to a limited extent, every admitted loss shall be liable to a deduction of 10 per cent., and the fund so deducted shall be taken from the premium fund, and added to the reserved fund :

“52. That, unless the council otherwise decide, no claim for loss shall in any case be admitted, which has arisen from the sale of goods delivered within ten days prior to the debtor committing any act of bankruptcy on which he shall be adjudged a bankrupt, or filing any petition for relief as an insolvent, or calling a meeting of his creditors, or suspending payment :

“53. The assured shall in every case first obtain the consent of the directors or manager of the society before taking any legal proceedings against any debtor ; otherwise the council may, if they see fit, disallow any claim for a loss arising from the non-payment of such debtor :

“54. Every assured shall, if required, give to the council satisfactory proof by statutory declaration, or otherwise, of the accuracy of all statements made by him relating to the contents of his policy, or any claim he may have made :

"55. Where, upon investigating any claim, it shall appear that the assured has declared on the face of his policy for less than the actual total amount of the returns of his business during the year in which the claim is made, then the amount of claim admitted by the society shall be proportionally reduced: provided also, that, when it shall appear to the satisfaction of the council that such declaration has been wilfully and fraudulently made for too small an amount, then the directors, at the request of the council, but not otherwise, may declare the policy of such assured void; and such assured shall forfeit all claims and rights under the same:

"56. The directors may exercise their discretion as to acting upon the authority given by the assured, at the time of making any claim in accordance with Art. 42; and any proceedings taken thereunder to recover any debt due to such assured shall, if unproductive, be at the sole cost of the shareholders; but the balance of any monies received from any debtor, after deducting the expenses incurred, shall be added to the premium fund of the year in which such loss shall have been recovered: provided always, that such balance shall first be subject to the operation of Arts. 49, 50, and 51:

"57. Every claim for loss must be made within six calendar months after the expiration of the usual credit; but no claim for any less sum than 5*l*. shall be made by any assured, or admitted by the council:

"58. That, unless some reason to the contrary be proved to the satisfaction of the council, all payments made to any assured by any debtor after realising the produce of any goods delivered by such assured since the date of his policy, shall be considered as payment made on account of such goods; and, after the expiration of the time of credit given on account of goods sold prior to the date of the policy, all payments shall be

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

considered as made upon account of goods delivered since the date of such policy :

“59. If any assured claiming on account of loss be assured in any other society in reference to such loss, his claim shall only be admitted to an amount proportioned to the sums guaranteed by this and such other society respectively :

“60. That, if it shall appear to be for the mutual interest of the assured, the directors, at the request of the council, but not otherwise, shall have power to cancel any policy, and written notice thereof shall be given to the assured, by delivering the same to the assured personally, or at his usual or last known place of business, within seven days from the day on which such policy has been so cancelled ; and such policy shall from the date of the service of such notice be null and void to all intents and purposes ; but the assured shall be entitled to every benefit secured by such policy up to the date of its being so cancelled, and shall be liable to pay the proportion of premium due up to such date.”

General aver-
 ment.

The declaration then proceeded to aver that the plaintiffs had done all things necessary on their part, and had been ready and willing to do all things, according to the said policy, rules, and regulations, which it was necessary that they should be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle the plaintiffs to be paid and reimbursed by the defendants the loss thereafter mentioned ; and that a reasonable time to pay or reimburse such loss had elapsed ; and that, during the continuance of the said agreement, a loss arose to the plaintiffs from the bonâ fide sale and delivery of goods by the plaintiffs for the purposes of trade to one Gibbons, a debtor of the plaintiffs, being at the time of such sale and delivery a trader within the meaning of the laws for the time being in

force relating to bankrupts: yet that the defendants had not paid or reimbursed the plaintiffs in respect of the said loss, but had therein wholly failed and made default, contrary to the said policy.

There was also a count for money payable by the defendants to the plaintiffs for money received by the defendants for the use of the plaintiffs, and for money found to be due from the defendants to the plaintiffs upon accounts stated between them: And the plaintiffs claimed 1500*l*.

The defendants pleaded, amongst other pleas,— Fourth plea. fourthly (to the first count), that, after the making of the said policy, and more than fifteen days before the commencement of this suit, the premium of 42*l*. payable by the plaintiffs on the 1st of December, 1853, as in the said policy mentioned, fell due and became payable, and was not paid within fifteen days after the same so fell due; whereupon the directors of the said society, with the approbation of the said council, cancelled the said policy, and declared the same void,—whereof the plaintiffs then, and before this suit, had notice.

To this plea the plaintiffs demurred,—the ground of Demurrer. demurrer alleged, being, “that it did not appear (by the plea) that the premiums became due, or that the policy was declared to be void, before the loss was incurred and became payable.” The defendants joined in demurrer.

Willes, in support of the demurrer.(a) It appears from the record, that the policy declared on was effected on the 10th of February, 1853; that a loss arose whilst the policy was subsisting; that, on the 1st of December, 1853, a certain premium became due from the plaintiffs

(a) The point marked for argument on the part of the plaintiffs, was as follows:— the premium became due, or that the policy was declared to be void, before the loss was incurred and became payable.”
“That it does not appear that

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

to the society, and was unpaid for fifteen days; and that the directors, with the approbation of the said council, cancelled the policy, and declared the same void. [*Cresswell*, J. From what time? *Jervis*, C. J. Ab initio.] The right to cancel, it is submitted, never arose in fact. A somewhat analogous question arose in the case of *Hartshorne v. Watson*, 4 N. C. 178, 5 Scott, 506, 6 Dowl. P. C. 404. An indenture of lease contained a proviso, that, in case of default on the part of the lessee, his executors, administrators, or assigns, in payment of the rent or performance of any of the covenants on his and their part, it should be lawful to the lessor to re-enter and hold the premises as if the indenture had not been made; and it was held, that a re-entry for non-payment of rent, was no answer to an action against the assignee for rent antecedently accruing. [*Jervis*, C. J. The proviso does not say that the lease shall be altogether void, but that, "from the time of re-entry, the lessor shall hold the premises as if the indenture had never been made." That case has very little application.] The 40th rule,—which provides that "those of the assured who during the year have had claims for losses admitted by the society prior to the premiums for such year falling due, shall be entitled to set off such admitted claims against such premiums,"—excludes what the defendants are contending for. By the previous provisions, and by the terms of the policy, the assured can only recover what the council shall award, pursuant to the 44th or 45th rule. [*Jervis*, C. J. It does not follow from what is stated on this record, that the defendants owed the plaintiffs enough to cover the amount of premiums due.] If the amount of premiums due exceeded the loss, the defendants might have shewn that by their plea. The meaning of the 40th and 41st sections, is, that the directors shall have the power of cancelling and declaring void a policy upon which premiums are in arrear,

and against which the assured has no admitted claim to set off. [*Maule, J.* Would it not be an answer to a claim under the 41st rule, that, before the expiration of the fifteen days, there was a sum due from the society to the assured in respect of an admitted loss? The power of cancelling is a mode of enabling the company to save themselves from future liability upon policies the premiums due upon which are in arrear. When the directors have the money in their own pockets, the power of cancelling cannot have been meant to exist. *Williams, J.* Should not the plaintiffs have replied that a loss occurred, the claim for which was admitted by the society prior to the premiums falling due,—following the words of the 40th rule?] To make a good plea, the defendants should have negatived the existence of circumstances which would render the 40th rule applicable. This is in effect an attempt to make the non-payment of a small sum a condition subsequent which shall defeat the payments already made. Assuming that it was the intention of the parties that all benefit accruing to the assured before their default should be taken from them, in order to sustain the case on the part of the defendants it must be shewn that they are entitled to recover back all that had previously been paid,—a consequence which one would expect to find provided for in express terms. [*Maule, J.* No doubt, to work a forfeiture, the language should be express. I must confess the rule seems to me to mean, that, in the case provided for, the directors may cancel and declare the policy void from that time,—like the case of a marine policy, which, in the event of a deviation, is void as to all that occurs after the deviation, but not before. If the act of the directors here is to avoid the policy ab initio, they must return the premiums paid.] The alternative given by the 41st rule shews it was not intended that the mere non-payment of premiums should

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

* See the 55th
 rule, *antè*, p.
 685.

enable the directors to avoid the policy *ab initio*. The 60th rule, which enables the directors, at the request of the council, to cancel any policy, provides that policies so cancelled shall be null and void to all intents and purposes from the time of notice of such cancellation. They could not by cancelling the policy relieve themselves from previous liability.* [*Jervis*, C. J. The object of the 60th rule was, to provide a means of expelling an improvident and reckless trader from the society.]

Cowling, for the defendants.(a) The object of the society in putting this defence upon the record, is,

(a) The points marked for argument on the part of the defendants, were as follows:—

“That the policy was granted by the society expressly in consideration of a sum of money already paid, and of further specified sums to be paid periodically, by the plaintiffs, by way of premium, during a term of three years at least,—the whole forming an entire consideration for the policy; and was subject to a condition subsequent contained in the 41st of the rules and regulations, whereby the directors, in case of non-payment of any of the said sums, might, at their option, cancel, and declare such policy void:

“That such cancellation must have been intended to defeat and avoid the said policy *ab initio*, and all claims which might have previously accrued thereunder, such claims, having accrued subject to the operation of the said condition, being

forfeitable under it, in the event of the subsequent non-payment of any of the said sums:

“That the contract of insurance was an entire contract for the term of three years at least; and that the payment of the premiums periodically during such term according to the policy, was intended to be and was in effect the payment by instalments of one entire premium for the insurance during such term, instead of the whole premium being payable in advance, according to the usual custom of policies of insurance of other descriptions; and that the effect of the 41st rule was intended to be, and is, that default in payment of any of such instalments should have, and has, at the election of the directors, the same consequence as would ordinarily result in the case of the non-payment of a premium payable in advance:

“That, in the case men-

merely to ascertain the opinion of the court upon these rules. The declaration, after stating the making of the policy, and setting out various of the rules and regulations of the society, avers a loss, and a default on the part of the defendants in reimbursing the plaintiffs in respect of such loss. Now, the 4th condition of the policy provides "that *the premium and reserved funds* of the society mentioned in the rules and regulations shall be liable, in the manner and to the extent mentioned in such rules and regulations, to reimburse and pay to the assured, their executors, administrators, or assigns, such sum or sums of money as shall from time to time be *awarded* to the said assured by the council of the society, in respect of the losses which may arise to the said assured from the bonâ fide sale and delivery (during the continuance of the agreement) of goods for purposes of trade, to debtors being at the time of such sale and delivery traders within the meaning of the laws for the time being in force relating to bankrupts; and that the said assured shall receive such payment and reimbursement at the times, and in the manner, and subject to the conditions and stipulations, mentioned and set forth in the said rules and regulations." And the 6th condition provides "that the said premium and reserved funds alone shall be liable to answer and make good to the assured all claims and demands whatsoever under or by virtue of this agreement." The 44th and subsequent rules shew the meaning of the word "awarded." This declaration does not aver either that the sum claimed in respect of the alleged loss was awarded to the plaintiffs pursuant to the rules and regulations, or that the premium and reserved funds were sufficient to satisfy the claim. It was not enough to

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

tioned in the 60th of the rules and regulations, and in which the cancellation is not intended to operate ab initio, such intention is expressed:
"And that the cancelling of the policy put an end to all rights of action upon it."

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

aver generally that the plaintiffs had done all things necessary on their part, and that they were ready and willing to do all things which according to the rules and regulations it was necessary that they should be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle the plaintiffs to be paid the alleged loss: but the plaintiffs should have shewn that a loss had occurred, that it had been considered and awarded upon by the council, and that the funds of the society were sufficient to pay it. Then, the effect of the cancellation of the policy by the directors, was, altogether to destroy its efficacy, to make it void ab initio: *Powell v. Divett*, 15 East, 29; *Davidson v. Cooper*, 11 M. & W. 778, 13 M. & W. 343 (in error); Sheppard's Touchstone, Vol. I, p. 70. And there is nothing in the 41st rule to prevent the general rule of law from applying here. As the council represent the whole body, the cancellation may be said to have taken place with the assent of the plaintiffs themselves. We may assume that the cancellation took place in the ordinary way, by detaching the seal, or drawing lines across the signatures.

Willes, in reply. The assumption that the cancellation spoken of in the 41st rule, and in this record, is a cancellation by tearing off the seal or crossing out the signatures of the parties, does not in any degree advance the argument. The rule as to alterations and erasures is this, that, if a deed be altered by the person claiming under it, or by a stranger, by his default, except as to estates that have already passed, the deed is at an end. It may be conceded, since *Davidson v. Cooper* and that class of cases, that an alteration or erasure in a material part of an instrument may be set up as an answer to a claim arising out of it: but there is a material distinction between an erasure or alteration falsifying the document, and a cancellation, the effect of which is to shew that

the party doing the act conceived the purpose of the instrument to have been answered, and its efficacy gone. A cancellation may always be explained by evidence: *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428, 5 D. & R. 403. [*Maule*, J. If the absence of *intention* to cancel be shewn, the thing is not cancelled.] The 60th rule clearly shews that "cancel" was not meant to be read here in the sense of "destroy." It was merely intended to give the directors such power as they could exercise by resolution,—the word "cancel" being used in a metaphorical sense.

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

JERVIS, C. J. I am of opinion that the defendants in this case are entitled to the judgment of the court. In the first place, Mr. Cowling objects to the declaration, and refers to the rules and regulations of the society for the purpose of shewing that all claims for losses are to be paid out of the premium and reserved funds only, and after adjustment by the council; and he insists that the sufficiency of those funds and the award of the council are conditions precedent to the plaintiffs' right to claim in respect of a loss, and should have been shewn by special averment. We think, however, that the general averment in this declaration is sufficient to include all that. The declaration, then, being good, the question arises whether the plea affords a sufficient answer. I think upon consideration that it does. The words of the 41st rule, read by themselves, are express,—“If the premiums on any policy shall not be paid within fifteen days after the same shall fall due, the directors may, with the approbation of the council, either cancel and declare such policy void, or enforce the payment of such premium.” The plea alleges, that, after the making of the policy, and more than fifteen days before the commencement of the suit, a certain premium became due and payable to the plaintiffs, and was not

1855.
 BAMBERGKE
 v.
 THE
 COMMERCIAL
 CREDIT.

paid within the time limited, and that thereupon the directors of the society, with the approbation of the council, *cancelled the said policy, and declared the same void*, whereof the plaintiffs then had notice. If the technical legal meaning be given here to the word "cancelled," the general rule of law would preclude all remedy upon the policy. But Mr. Willes says it cannot have the strict technical meaning, because the 60th rule shews that the parties, when they so intended, knew how to express that the instrument was to be null and void. Now, if the policy had been absolutely cancelled, the rule of law would have prevailed. The policy, it is to be observed, is in the possession of the plaintiffs. The 60th rule shews the meaning of the word "cancelled:" in the case there provided for, the policy, though declared void, is to remain effective so as to give the assured all the benefit he was entitled to under it up to the time of its cancellation. Under rule 41, where the premium is in arrear, the directors are empowered to cancel and declare the policy void; and, whether that means with or without actual cancellation, it is to be void from the commencement, and no remedy lies upon it. Mr. Cowling says that that must be the meaning, because the 41st rule provides, that, if the premiums are in arrear, the directors may, with the approbation of the council, cancel and declare the policy void; and, as the council represents the whole body, therefore the cancellation is made with the assent of the claimants themselves. We must, however, look at the 40th rule, to see if, reading the 40th and 41st rules together, it was the intention of the parties that the directors should have power to declare a policy void for non-payment of premiums after a loss has occurred. The words of the 41st rule, as explained by the 60th, seem to me to be clear to shew that a right to declare the policy void has arisen in this case; the assured

having made default in payment of the premiums due. And there ought to be strong words in the 40th rule to shew that that right does not exist. The plaintiffs have failed to perform a condition in the contract by which they agreed to be bound. For these reasons, I am of opinion that the defendants are entitled to judgment.

1855.

BAMBERGER
v.
THE
COMMERCIAL
CREDIT.

MAULE, J. I entirely agree with my Lord Chief Justice.

CRESSWELL, J. I am of the same opinion. The 40th rule does not control the express provision of the 41st. Notwithstanding the power to set off admitted claims for losses against premiums, the 41st rule expressly declares, that, if the premiums on any policy shall not be paid within fifteen days after the same shall fall due, the directors may, with the approbation of the council, cancel and declare such policy void. If void, there can be no power to sue upon the policy. The 60th rule does not in my opinion at all interfere with this construction. When the parties intended to provide for a partial or limited avoidance of the policy, they knew how to do so; for, the 60th rule declares, that, in the event there provided for, the policy shall be void from the time of notice, but that the assured shall be entitled to every benefit secured by such policy up to the date of its being so cancelled, and shall be liable to pay the proportion of premium due up to such date. There is no such provision in the 41st rule.

WILLIAMS, J. I am of the same opinion. The plea is good, even assuming, that, in order to sustain it, the defendants were bound to establish the proposition, that, by the cancellation under the 41st rule, the policy becomes void ab initio. It is unnecessary to decide whether the word "cancel" in that rule means a can-

1855.
 BAMBERGER
 v.
 THE
 COMMERCIAL
 CREDIT.

cancellation in the strict legal sense of the word. But the use of that word shews that it was the intention of the parties that the instrument should, when declared void under the provisions of the 41st rule, be void to the same extent as if an actual cancellation had taken place. It serves to explain what the parties meant.

Judgment for the defendants.

GETHER v. CAPPER.

Jan. 26.

By a charterparty for a voyage from Sundswall to Southampton, it was stipulated that the owner should receive "the highest freight which he could prove [or 'prove by evidence'] to have been paid for ships on the same voyage or passage by water when the vessel passed Elsinore, but not less than 90s. per St. Petersburg standard hundred;"—Held, that the charterparty did not contemplate strict legal proof of the actual payment of the higher rate of freight, but reasonable evidence that such higher freight had been paid or contracted to be paid: and (dubitante *Jervis*, C. J.) that the owner could not entitle himself to a higher rate of freight than the 90s., by proving that other vessels had been chartered at such higher rate for a voyage to London,—that not being, within the fair intendment of the charterparty, the same voyage.

THIS was an action for freight upon a charterparty. The first count of the declaration stated, that, on the 25th of June, 1853, by a certain charterparty then made between the plaintiff and certain persons therein described as Messrs. Hoare, Buxton, & Co., of London, it was agreed, that, after having performed the voyage from Gafle to Honfleur, the plaintiff should proceed from thence to Sundswall, and there on account of the charterers should take on board a cargo of wood, with the necessary deck-load and stowage, as much as the vessel could conveniently carry, and should then without delay proceed to Southampton, where the cargo was to be discharged according to the bill of lading, and the voyage was to conclude: That it was further agreed, that, upon delivering the same at the said place of discharge, the plaintiff was to receive *the highest freight which he could prove to have been paid for ships on the same voyage when the said vessel passed Elsinore*, but not less

than 90s. British sterling, per St. Petersburg standard hundred, computed at one hundred and sixty-five British cubic feet for planks, battens, and boards, and one hundred and fifty cubic feet for timber, and full freight for the deck-load, and for short lengths for stowage, all with 5 per cent. hat-money,—which freight was to be paid to the plaintiff, after a right delivery of the cargo, half in cash, and half in four months' bills on London, to be approved of by him : That it was further agreed that the necessary moneys for ship's disbursements at the place of lading might be received from the shipper, against insurance, and in reduction of freight : That the cargo was to be delivered free to and from the ship's side at all places ; and, should lighters be required, they should be for account of the freighter ; and that the freighter was to clear the cargo in all ports and rivers : That the said freighters assigned to the defendant, and the defendant then became and was the assignee of, the said cargo, and entitled to receive the same : And that thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, would deliver unto the defendant as such assignee the said cargo according to the said charterparty, the defendant then promised the plaintiff to perform and fulfil all things in the said charterparty contained on behalf of the freighters to be performed : That all times had elapsed, and all things had been done by the plaintiff necessary to entitle him to the fulfilment of the said promise on behalf of the defendant, and to payment according to the terms of the said charterparty : That *the plaintiff was able to prove, and that the fact was, that the highest freight paid for ships on the same voyage at the time the said vessel passed Elsinore, was, to wit, 7l. 7s. 6d. per St. Petersburg standard hundred,—of which the defendant always had notice : That, by reason of the premises, a large sum, to wit, the sum of 800l., became due and payable to the*

1855.

GETHER

v.

CAPPER.

Mutual promises.

General allegation of performance.

Special allegation.

1855.

GETHER

v.

CAPPER.

Breach.

plaintiff for the freight of the said vessel, and for percentage thereon, and for port-dues, and otherwise, according to the terms of the said charterparty: And that, although a certain sum, to wit, the sum of 167*l.* 3*s.* 5*d.*, had been paid in part liquidation of the said larger sum: Yet that the defendant had not paid the residue according to the terms of the said charterparty, and had wholly refused either to give such bills as in the said charterparty was mentioned, or to pay in cash the said freight and charges, or any part thereof.

Second count.

And the plaintiff also sued the defendant for money payable by the defendant to the plaintiff for freight for the conveyance by the plaintiff for the defendant at his request, of goods in ships; and for money paid by the plaintiff for the defendant at his request; and for money found to be due from the defendant to the plaintiff upon an account stated between them: And the plaintiff claimed 1000*l.*

Pleas.

The defendant pleaded,—first, that he did not make the agreement as alleged,—secondly, to so much of the first count as claimed freight exceeding 90*s.* British sterling per St. Petersburg standard hundred, computed as aforesaid, with 5*l.* per cent. hat-money, that the plaintiff *was not able to prove, nor was it the fact*, that the highest freight paid for ships on the *same voyage* at the time the said vessel passed Elsinore, exceeded such 90*s.*, with such 5*l.* per cent. hat-money,—thirdly, that the plaintiff did not *prove* that any higher rate of freight than 90*s.* per hundred had been paid for ships on *the same passage by water* when the said vessel passed Elsinore, according to the true intent and meaning of the said contract. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The plaintiff was unable to prove that any vessels had made the voyage from Sundswall (which is one of a cluster of small ports

in the Gulf of Bothnia) to Southampton at or about the time referred to in this charterparty. But one Northcote, a shipping agent, proved,—and he had previously furnished the captain with certificates to the same effect,—that he had in June and July, 1853, made charterparties from Sundswall, or one of the ports adjacent, to London, at 7*l.* per St. Petersburg standard hundred, and that a fair proportion of freight for the difference between London and Southampton would be 7*s.* 6*d.* additional.

1855.

 GETHER
 v.
 CAPPER.

The same witness also stated that the correct translation of the clause in the charterparty as to freight, was as follows:—"the plaintiff to receive the highest freight which he can *prove by evidence* to have been paid for ships on the same *seas or waters* when the vessel has passed Elsinore inwards, but not less than 90*s.* British sterling,"—the word "farvand" in the original, "seas or waters,"—being a mercantile term well known in Norway.

Other witnesses also proved the difference of freight between London and Southampton to range between 5*s.* and 7*s.* 6*d.*; and that Northcote's certificates had been produced to the defendant by the captain at the time of demanding the freight, but that the defendant had declined to pay it because it was not shewn that any vessel had been chartered for the precise voyage, viz. from Sundswall or one of the adjacent ports to Southampton.

Witnesses who were called on the part of the defendant translated the word "farvand," thus,—“voyage or passage by sea,” “the same way by water,” and “similar passage or voyage by water or sea:” but all agreed in the translation of the other part of the clause, viz. that it was, “which he can prove *by evidence* to have been paid.”

On the part of the plaintiff, it was insisted, that, inasmuch as he could not prove what was the highest freight from Sundswall to Southampton at the time the freight

1855.

GETHER

v.

CAPPER.



on this charterparty was to be ascertained, the jury might arrive at the amount by taking the highest rate for freights from Sundswall to London, which was proved to be 7*l.* per St. Petersburg standard hundred, and adding thereto 7*s.* 6*d.* for the difference between London and Southampton.

For the defendant, it was insisted that there was a variance between the contract alleged in the declaration and that proved, and that he was entitled to have the declaration amended accordingly,—the court having already put a construction upon the word “proved” (antè, p. 39,) which in one event might make the variance material. The plaintiff declined to amend; and the Lord Chief Justice ruled that he had no power to compel him. It was further insisted, that, inasmuch as the plaintiff was not in a situation to prove that a higher amount of freight than 90*s.* had been paid for vessels upon the same voyage as that mentioned in the charterparty, his claim must be limited to the 90*s.*

A verdict was found for the plaintiff for 307*l.*, the amount due upon the estimate of the plaintiff’s witnesses, of 7*l.* for a voyage to London, with the addition of 7*s.* 6*d.* for the difference between London and Southampton: and leave was reserved to the defendant to move to enter a verdict for him, or to reduce the damages, as the court should think fit.

Bovill, on a former day in this term, moved to enter a verdict for the defendant, or to reduce the damages, pursuant to the leave reserved. He submitted that the word “proved” in the charterparty meant proved by evidence, either such as would satisfy a jury, or such as ought to satisfy a reasonable man, of the existence of the fact to be established,—by a letter, a charterparty, or a receipt for freight, for instance. [*Jervis*, C. J. To entitle you to have the declaration amended in the way

suggested, you must, I think, shew that the words used in the charterparty mean "proved by *legal* evidence," and that would not be setting out the legal effect of the contract.] At all events, the plaintiff could not be entitled to the higher freight, upon proof that a higher freight had been paid upon some other voyage than that mentioned in the charterparty, and then adding the difference of value between the one port of destination and the other. That would not be construing the charterparty either according to the words used, or any fairly presumable intention of the parties. Besides, to entitle the plaintiff to the higher rate of freight, he should have shewn that freight at the rate he claimed had not merely been *contracted* to be paid, but had *actually been paid*, and that at the time when *this* vessel passed Elsinore. [*Cresswell*, J. I incline to think we must read "paid" in the popular and ordinary sense in which the word is commonly used, viz. "contracted for."] In the absence of anything to control or limit its meaning, paid means paid, and nothing else. *Dickson v. Zizania*, antè, Vol. X, p. 602, was referred to.

1855.

 GETHRE
 v.
 CAPPER.

JERVIS, C. J. You may take a rule generally, for the purpose of discussion; though some of my learned Brothers think it should be granted on the first point only, entertaining no doubt whatever that the word "paid" would be satisfied by proof of a *contract for payment*.

Byles, Serjt., and *Lush*, now shewed cause. There was no variance between the declaration and the proof. The words of the charter simply required that the fact should exist, not that the plaintiff should prove or be in a condition to prove by legal evidence that a higher rate of freight than 90s. had been paid for other vessels when the vessel in question passed Elsinore. The construction

1855.

GETHER
v.
CAFFER.

would have been the same if those words had not been there at all. [*Maule*, J. Any proof of a matter of fact is in one sense "proof by evidence."] And the word "paid" was evidently used in the popular sense of "contracted for:" it was not necessary to prove actual payment. The evidence offered at the trial shewed that several vessels from the same neighbourhood were chartered about the same time, for London, at a freight of 7., and that 7*s*. 6*d*. extra was a fair average for the difference between London and Southampton. The real question is, whether the same "voyage" or "passage by sea" meant necessarily a voyage from the same Norwegian to the same British port, or whether the charterparty is not to be construed with that reasonable degree of latitude and liberality of construction which is usually applied to mercantile instruments. It is impossible that it can be contended on the other side that the strict and literal construction is to be adopted here, inasmuch as it was proved that a voyage from any one of the five or six ports in the Gulf of Bothnia adjacent to Sundswall, is considered the "same voyage," so far as regards the terminus a quo. [*Maule*, J. There have been recent decisions in this court, where charterparties have been construed in the way you suggest, in ascertaining the rate of freight to be paid for unenumerated goods.] In *Cockburn v. Alexander*, antè, Vol. VI, p. 791, a ship was chartered to proceed to Port Phillip, and there load from the freighter's factors "a full and complete cargo of wool, tallow, bark, or *other legal merchandise*,"—the quantity of bark not to exceed 100 tons, and the quantity of tallow and hides not to exceed 80 tons,—and was to proceed therewith to London, and deliver the same, "on being paid freight *as follows*,—for wool, 1½*d*. per lb. pressed, and 1½*d*. and ¼ of a penny per lb. unpressed, gross weight; tallow, 3*l*. per ton; bark, 4*l*. per ton; and hides, 2*l*. per ton,—the latter not to exceed 20 tons,

without consent of the captain, &c.; one third of the freight to be paid in cash, on unloading and right delivery of the cargo, and the remainder in cash, or by approved bills at two months following: and it was held, that the freighter was entitled to load the ship with an assorted cargo of any "legal merchandise;" but that the owners were entitled to be paid freight upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz. 100 tons of bark, 60 tons of tallow, and 20 tons of hides, and the residue of wool, pressed or unpressed. The court there professed to apply the test of reasonable intendment, to supply what was wanting in the language of the charterparty. Again, in *Warren v. Peabody*, antè, Vol. VIII, p. 800, by a charterparty it was agreed that the ship should proceed to Baltimore, and there load a full cargo of *produce*, and proceed therewith to the United Kingdom, and deliver the same, on being paid freight "*at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for indian corn or other grain*;" that the cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores; and that not less flour or meal than naval stores was to be shipped. The vessel arrived here with a cargo consisting of 769 hhds. of tobacco, 6047 bushels of bran, 2000 *bushels of oats*, 5000 oak-staves, and 3 barrels of flour. The evidence shewed that a quarter of indian corn or wheat weighing 480 lbs. would occupy a space of 10½ cubic feet, and that a quarter of American oats, which weighed upon an average 272 lbs., would occupy a space of 16 cubic feet. It also appeared that *oats* were not a usual shipment from America. It was held, that "other grain" in this charterparty, must be taken to mean such description of grain as would average 480 lbs. to the quarter, and therefore to exclude *oats*; and that the ship-owner was entitled to receive freight upon the

1855.

 GETHER
 v.
 CAPPER.

1855.

 GUTHRIE
 v.
 CAPPER.

supposition that 3000 barrels of flour, meal, or naval stores had been shipped, and, for the rest of the space, *at the rate of 11s. per quarter of indian corn, or other grain of the average weight of 480 lbs. to the quarter.* Maule, J., there said,—“ It frequently happens that instruments of this sort are prepared in anticipation of a state of circumstances which never arises ; and, consequently, they are sometimes of difficult application to the case which *has* arisen.” And, after referring to *Cockburn v. Alexander*, the same learned judge further observed,—“ But, as this clause was intended to regulate the freight, not for grain only, but for every description of goods,—for which purpose it was necessary that it should ascertain a precise or reasonably precise rate of payment,—we think there is sufficient reason for excluding oats, as not being within the probable intention of the parties when speaking of ‘ other grain.’ ” These two cases are closely analogous to the present.

Bovill and *Raymond*, in support of the rule. Proof, it is submitted, means something more than notice of the existence of a fact. This court held on the former occasion,—*antè*, p. 39,—that the charterparty did not contemplate strict *legal* proof ; but that the owner would be entitled to the highest rate of freight which the master, to the knowledge of the freighter, was in a position to prove, by reasonable evidence to have been *paid*. [*Jervis*, C. J. I doubt whether it was necessary,—as the court seemed rather to intimate on the argument of the demurrer,—that the defendant should have notice that the plaintiff was able to prove the higher freight to have been paid. The question now is, whether there is a variance.] According to the plaintiff's own witnesses, the correct translation of the charterparty in this respect, was, “ could prove by evidence ; ” and, whatever proof meant in the declaration, it means the same in the

plea. The defendant was entitled to have the true contract stated in the declaration. [*Jervis*, C. J. The plaintiff could not be compelled to amend.] The defendant contracts to pay a certain amount of freight, with a proviso, that, if the plaintiff can prove that a higher rate has been paid for vessels making the same voyage when this vessel passed Elsinore, he should pay such higher freight. Are these words satisfied,—is the defendant's liability to the higher rate of freight established,—by proof that a higher freight has been paid, or contracted to be paid, for another and a different voyage? Why is the word "same" to receive a different construction in this case from what it would receive when found in any other instrument? In this charter-party, the word "voyage" occurs three times: why should not its construction be alike in all three cases? If this ship had been insured for a voyage from Sundswall to Southampton, and, instead of going to Southampton, had gone to London,—could the insurers have insisted, in the event of a loss, that that was the *same* voyage? Or, could the master have insisted upon discharging the cargo in London, instead of carrying it to Southampton? In *Uhde v. Walters*, 3 Campb. 16, in an action on a policy of insurance "to any port in the Baltic," evidence was admitted to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated by geographers as separate and distinct. If the court could not judicially see the fact in that case, how can they see upon this contract that a voyage to London is the same voyage as a voyage to Southampton? A similar decision was come to in *Robertson v. Money*, R. & M. 75, where, in an action on a policy of insurance on a voyage "at or from the port or ports of discharge and loading in India and the East India Islands,"—evidence was admitted to prove that the Mauritius is considered in mercantile

1855.

 GETHRER
 v.
 CAPPER.

1855.

GETHER
v.
CAPPER.

contracts as an East India island, although treated by geographers as an African island. If the construction of this charterparty is left doubtful, it lay on the plaintiff, who seeks to establish his right to a different rate of freight from that specially provided for, to remove that doubt. [*Jervis*, C. J. Suppose your argument correct, and that no vessel went from Sundswell to Southampton that season, what freight would the plaintiff get?] He would have the 90s. [*Jervis*, C. J. But, suppose the minimum freight were not mentioned?] In that case, he would recover upon a quantum meruit. [*Maule*, J. Then *Cockburn v. Alexander*, and *Warren v. Peabody*, and that class of cases, may be applicable.] The plaintiff has not, it is submitted, established the construction for which he contends.

MAULE, J. It appears to me that this case is to be determined by the general rule of construction, so often referred to as the golden rule, which is equally applicable to acts of parliament and to private contracts, viz. that the grammatical sense of the words must be adhered to, unless such a construction would be contrary to the expressed intention of the parties, or would involve some absurdity, repugnance, or inconsistency. (a) Here, it appears to me that the parties have in plain language provided exactly for the event which has taken place: the charterer is to pay freight at 90s. British sterling per St. Petersburg standard hundred; but, if the owner is able to prove a higher freight to have been paid (or, possibly, contracted for, or payable,) for ships on the same voyage when this vessel passed Elsinore, the charterers agree to pay such larger freight. There is not the smallest difficulty or obscurity in either of these expressions; and they apply to the very circumstances

(a) See *Warburton v. Loveland d. Ivic*, cited *antè*, p. 484.

which have arisen. The voyage has taken place, that is, a voyage from Sundswall to Southampton; and the plaintiff is unable to prove that any one upon that voyage has paid or contracted to pay more than 90s. per St. Petersburg hundred. In the course of the argument, I was a little struck with some decisions in which this court put a liberal construction upon loose mercantile contracts. Instruments of that description are frequently so framed as to require considerable force of construction to apply them; and in such cases the courts have considered that they ought to be dealt with so as to give effect to the general intent that is to be gathered from the whole of the instrument. It is not easy to define or to describe this rule of construction. And it is one which is to be had recourse to only in cases of necessity, where it is pretty clear that the parties had some intention which cannot take effect at all if a rigid rule of construction be applied to the instrument. This is a less eligible rule than the one I first mentioned: but it is only just to the parties, where they have expressed their intentions in loose terms, to adopt that mode of construction which will as nearly as circumstances will allow effectuate the purposes they appear to have had in view. It is not less imperative, however, on the court to adhere to the language of the contract, where it has provided exactly for the event which has happened. A party has a right to say,—“I have used language which aptly expresses my intention, and therefore it is unnecessary to have recourse to the power of construction which is applied to obscure and doubtful contracts. I only ask of the court to give the natural meaning to the words used in the instrument before it, without looking either to the right or to the left.” Nothing is more desirable than that persons entering into contracts of this sort should express themselves with precision as to events which are at all probable and likely to happen; and,

1855.

GETHER
v.
CAPPER.

1855.

GETHER
v.
CAFFER.

when they have done that, it would be running an inconvenient risk of injustice, because it is a mercantile contract, to give the go-by to a distinctly expressed meaning, and impose upon the parties something which they did not mean. The charterparty now under consideration having clearly and unequivocally declared that a certain amount of freight shall be paid, I think we should be overstepping the bounds of our duty and our authority if we were to hold that more was intended to be paid, where the precise event upon which that larger payment was made contingent has not happened. It is not dealing fairly with parties, not to give effect to words which are plain and free from ambiguity. Suppose a merchant abroad consigns goods to a merchant in this country, with distinct directions to sell them, and with the proceeds furnish him with other goods (describing them) if they could be sent at a given price,—would it not be highly inconvenient to hold that the consignee might exercise his discretion as to the description and the price of the goods he sends in return? In all cases of contracts,—whether mercantile or otherwise,—where the expressions used are precise and clear, they should be exactly followed out. Here, I feel no difficulty whatever in construing this charterparty according to the plain grammatical sense of the words used by the contracting parties, there being nothing in the case to shew that they ought not to receive that construction.

CRESSWELL, J. I am of the same opinion. It appears that the freighter contracted to pay 90*s.* at all events from Sundswall to Southampton; but that he stipulated to pay more in a certain event. That event was, that the plaintiff should be able to prove a higher freight to have been paid for ships on the same voyage or “passage by water.” My brother Byles contended that the correct translation of the word in the original document, was,

“seas or waters.” In that, however, I think he was hardly consistent: it would lead to an indefinite enlargement of the contract, including even London: and I think it would be impossible to contend that a voyage to London was the same as a voyage to Southampton. It is to be observed, as Mr. Raymond says, that the word “voyage” occurs three times in the charterparty, and that it must necessarily mean the same in each case. To entitle him, then, to a higher rate of freight for the voyage in question than 90s., the plaintiff was bound to shew that some one had paid, or contracted to pay, such higher freight for ships on the same voyage when this vessel passed Elsinore. In the earlier part of the argument, I was disposed to think that the contract might be taken to mean the highest current freight, and that that might be taken as the measure here, even although no other vessel might be shewn to have made the same voyage about the period in question. But the argument of Mr. Bovill has satisfied me that the highest current freight could not have been intended. The defendant here has contracted to pay a certain sum, to be increased in a given event which is precisely and intelligibly described: and, as that event has not happened, we cannot depart from the plain meaning of the words used, and take upon ourselves to calculate the value of a voyage from Sundswall to Southampton, by reference to the amount of freight proved to have been paid upon voyages to some other port. Adhering to the words of the charterparty, we must hold that the parties have not provided for the event which has happened. There was no other ship on the *same voyage* when this ship passed Elsinore.

1855.

 GETHER
 v.
 CAPPER.

WILLIAMS, J. I am of the same opinion. I am unable to discover any reason why we should not construe this charterparty according to the natural meaning

1855.

GETHER
v.
CAPPER.

of the words used in it. I must confess I never have entertained the smallest doubt. The charterer agreed to pay 90s., unless the owner could shew that a higher rate of freight had been paid or contracted for, for the same voyage. This he has not been able to do.

JERVIS, C. J. I was much struck by the view which was presented by Mr. Raymond. But, notwithstanding that, and the opinions expressed by my learned Brothers, I still entertain doubts, though they are not such as to induce me to dissent from this rule being made absolute.

Rule absolute.

HARRIS and Others v. ALEXANDER WILLIS, Secretary of
THE SHIP-OWNERS TOWING COMPANY.

Jan. 25.

To an action for an injury to the plaintiffs' vessel by a collision in the river Thames, the defendants pleaded, that the merits in respect of the demand by this action sought to be enforced, had been already tried and determined, and certain proceedings, to which the plaintiffs

THE declaration stated, that, at the time of the committing the grievances thereafter mentioned, the plaintiffs were lawfully possessed of a steam-vessel, and were navigating the same in the river Thames, and the said company were also then possessed of a steam towing-vessel, which was then under the government and direction of the certain then servants of the said company who were then navigating the same in the said river: yet the said company, by their said servants, so negligently, carelessly, and improperly navigated and conducted their said vessel, that, by and through the mere negligence, carelessness, and improper conduct of the

and the defendants were parties, had been had in the Admiralty court, and that the merits upon which the plaintiffs sought to recover in this action were thereby and then tried, and, after *due proceedings had* and taken in the said court, and *in due form of law*, determined by that court in favour of the defendants; and that it was then held and adjudged by the said court that the collision occurred through the negligence of the plaintiffs, and not through the negligence of the defendants:—

Held, that the plea was no answer to the action, inasmuch as it did not shew upon the face of it that the Admiralty court had jurisdiction over the matter in question.

said company and their said servants in that behalf, the said vessel of the said company forcibly came into collision with the said vessel of the plaintiffs, and thereby the plaintiffs' said vessel was greatly injured and broken, and the plaintiffs were put to expense in repairing their said vessel, and the same was rendered useless to the plaintiffs for some time, and the plaintiffs were deprived of divers profits which might and otherwise would have accrued to them from using the said vessel during such time, and were and are otherwise injured: And the plaintiffs claimed 200*l*.

1855.

HARRIS
v.
WILLIS.

Second plea,—that the merits in respect of the demand by this action sought to be enforced, had been already tried and determined, and certain proceedings to which the plaintiffs and defendants were parties had been taken and had, in the High Court of Admiralty, before the Right Hon. Stephen Lushington, doctor of civil laws, judge of the said court; and that the merits upon which the plaintiffs sought and seek to recover in this action were thereby and then tried, and, after due proceedings had and taken in the said court, and in due form of law, determined by the said judge, and by certain elder brethren of the Trinity House then and there assisting him, in favour of the said Ship-Owners Towing Company; and it was then held and adjudged by the said court that the said collision occurred through the negligence, carelessness, and improper navigating by the plaintiffs of their said vessel, and not by or through the negligence, carelessness, or improper conduct of the said company or their said servants in that behalf.

Second plea.

The plaintiffs joined issue on the second plea; and, for a second replication thereto, said that they had duly appealed to Her Majesty in council against the decision in the said plea mentioned, and that the said appeal was then pending and undetermined; and they also demurred to the second plea, the grounds of demurrer stated in the

Replication and
demurrer.

1855.

 HARRIS
 v.
 WILLIS.

margin, being, "that it does not appear that the proceedings in the Admiralty court were for the same demand as now sued for, or that the same matter as is in question in this suit was directly in question in the Admiralty court; nor does it appear that the Admiralty court had any jurisdiction to determine the question now in issue."

Rejoinder and
demurrer.

The defendant joined in demurrer, and also demurred to the second replication, on the grounds that "the judgment subsists, and may be pleaded as a good judgment, until reversed; and that the validity of a judgment is in no way affected by the mere appeal of the defeated party." Joinder.

Finlason (for *Lush*), in support of the plaintiffs' demurrer. The second plea is founded upon the statute 10 Vict. c. xxxi, the 1st section of which enables the company to sue and be sued in the name of the secretary or any one of the directors for the time being, and the 4th of which enacts "that the proceedings in any action or suit by or against such nominal party, in which the merits in respect of the demand thereby sought to be enforced shall have been tried and determined, may be pleaded in bar of any other action, suit, or other proceedings for the same demand by or against the company or any other such nominal party as aforesaid." The plea is bad upon two grounds,—first, because it does not shew that the court of Admiralty had jurisdiction in the matter,—secondly, that, assuming that that court had jurisdiction, the merits could not be tried therein. 1. It is to be inferred from the declaration, though it is not so expressly alleged, that the collision complained of took place in the river Thames, where the court of Admiralty has no jurisdiction: *The Case of the Admiralty*, 13 Co. Rep. 51; *Morse v. Slue*, 1 Ventr. 190, 288, Sir T. Raym. 220, 1 Mod. 85, 2 Keble, 806,

3 Keble, 72, 112, 135, 2 Lev. 69; *Palmer v. Pope*, Hobart, 79; *Vellhasen v. Ormsley*, 3 T. R. 315. [*Jervis*, C. J. You need not cite authorities to shew that the court of Admiralty has no jurisdiction *infrâ corpus comitatus*.] 2. Then, in the Admiralty court the proceeding is in rem, and therefore the merits of this action could not have been determined there. It cannot be the same demand. [*Jervis*, C. J. Damages and the value of the ship are identical: you cannot recover more than the value.] *Kitchen v. Campbell*, 3 Wils. 240, 304, 2 W. Blac. 779, 827, and the cases cited in the notes to *The Duchess of Kingston's Case*, 2 Smith's Leading Cases, 424—460, shew that this is a matter which is not pleadable in bar. The plaintiffs may have failed in the Admiralty court for want of proof. Then, as to the statute, the meaning of the 4th section obviously was, that, where there has been an adjudication, it shall, subject to all the common law incidents of a judgment, be conclusive.

1855.

HARRIS
v.
WILLIS.

Milward, *contra*. *Primâ facie* the court of Admiralty has jurisdiction in all cases of maritime collision. There is nothing on the face of this declaration to shew that the matter here complained of occurred within the body of any county: on the contrary, it appears that both vessels were in the river Thames. [*Cresswell*, J. How do we know that the court of Admiralty has jurisdiction in any part of the Thames?] The court will take judicial cognisance of the jurisdictions of the other courts. [*Cresswell*, J. But not of the geographical position of the river Thames. *Williams*, J. It is quite immaterial whether the collision took place in the Thames or in any other river.] The plea states that the merits of this action were tried, and, after *due proceedings* had and taken in the Admiralty court, and *in due form of law*, determined by that court. If that court had no juris-

1855.

HARRIS
v.
WILLIS.

diction, it could not in due form of law have determined the matter. There being nothing in the declaration to shew that the collision took place within the body of the county, the defendant was not bound to negative that fact in his plea. [*Williams, J.* The defendant was bound to shew upon the face of his plea a good answer to the declaration.]

Per Curiam. The plaintiffs are entitled to judgment on the demurrer to the second plea, and the defendant on the demurrer to the replication.

Judgment accordingly.

PEEL and Another v. THOMAS.

Jan. 27.

The defendants and others met for the purpose of forming a company for working a mine on the cost-book principle, the concern to consist of 60,000 shares, of which 15,000 were to be appropriated to the owner of the mine, 33,750 to A., B., and C., and the remainder allotted to other parties in

THIS was an action against the defendant, as a partner or shareholder in a mining association for the working upon the cost-book principle of a mine called the Cwm-heisian Mine, to recover a sum of 60*l.* 14*s.* 8*d.* for machinery supplied to the mine by the plaintiffs.

The defendant pleaded never indebted.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. Evidence having been given of the supply of the machinery in respect of which the action was brought, the plaintiffs called for the company's minute-book, from which they read the following minutes:—

proportion to certain capital subscribed by them,—1125 being allotted to the defendant, for which he paid 100*l.*: and it was at that meeting resolved, amongst other things, *that the requisite capital to work the mine for the first six months should be found by A., B., and C.* The same resolution also stated that the mine had been purchased of the owner for the sum of 1000*l.* in cash, and 15,000*l.* to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations,—such payment of 15,000*l.*, or surrender of the mine to the owner, being optional by the said adventurers:—Held, that, by this arrangement, each adventurer became a partner in the concern *from the commencement*, and liable as such for goods supplied for the working of the mine.

"At a meeting for the purpose of forming a company on the cost-book principle for working the Cwmheisian Mine, held October 21, 1853, at Mr. Readwin's office,— present

1855.

PEEL
v.
THOMAS.

Resolution of
Oct. 21.

"Sir Charles Kirkpatrick, "Mr. Coleman,
"Capt. Charretie, "Mr. Brunton,
"Mr. White, and
"Mr. Readwin, "Mr. Joseph Thomas
(the defendant),

"The mine was stated by Mr. Readwin to have been purchased of Mr. Bruin for the sum of 1000*l.* in cash, and 15,000*l.* to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations; such payment of 15,000*l.*, or the surrender of the mine to Mr. Bruin, being optional by the said adventurers.

"It was then proposed that the mine should be divided into sixty thousand shares, of which, fifteen thousand being reserved as above for Mr. Bruin, thirty-three thousand seven hundred and fifty were declared to be the property of Mr. Readwin, Sir Charles Kirkpatrick, and Mr. Brunton; and the remainder were, in consideration of their engagement to find the sums of money placed against their respective names, divided as follows:—

	Shares.
"To Captain Charretie . . . £150	. 1688
"To Mr. Nichols 55	. 562½
"To Mr. <i>Thomas</i> (the defendant) 100	. 1125
"To Mr. White 100	. 1125
"To Mrs. West 50	. 562
"To Mr. Coleman 50	. 562
"To T. A. Readwin 500	. 5625
Shares	11,250

"It was proposed, and accepted, that *Sir Charles Kirkpatrick, Mr. Readwin, and Mr. Brunton* should find

1855. *the capital requisite for the operations of the mine during six months from this day.*

PEEL
v.
THOMAS.

"It was resolved, that, should any of the parties above named fail to pay the amount placed against his or her name by 12 o'clock to-morrow, the shares now allotted to him or her shall be forfeited :

(Signed) " *Joseph Thomas,* " *W. W. White,*
" *T. A. Readwin,* " *E. C. Nichols,*
" *John Charretie,* " *B. Coleman,*
" *C. S. Kirkpatrick,* " *J. D. Brunton."*

Resolution of
Oct. 22.

"At a meeting of adventurers in the Cwmheisian Gold Mining Company, held at Mr. Readwin's offices, No. 2, Winchester Buildings, in the city of London, on Saturday the 22nd of October, 1853,—present, Sir Charles S. Kirkpatrick, in the chair, Messrs. *Thomas*, *Charretie*, *White*, *Brunton*, *Readwin*, *Mrs. West*, Messrs. *Nichols*, and *Coleman*,—

"It was resolved, that the Cwmheisian Mine be worked on the cost-book system, in sixty thousand equal parts or shares; and that the sixty thousand parts or shares be and are hereby allotted in the following proportions, viz. :—

	Shares.
"To Sir Charles S. Kirkpatrick and others, as trustees for George Bruin . . .	15,000
"To Sir Charles S. Kirkpatrick, Bart. . .	11,250
"To John Dickinson Brunton . . .	11,250
"To Thomas Allison Readwin . . .	11,250
"To John Charretie . . .	1,688
"To Edwin Cox Nichols . . .	563
"To <i>Joseph Thomas</i> . . .	1,125
"To William Wiggins White . . .	1,125
"To Mrs. Charlotte West . . .	281
"To Edward Towsey . . .	281
Carried forward . . .	53,813

Brought forward	53,813	1855.
" To Benjamin Coleman	562	
" To Thomas Allison Readwin (for friends)	5,625	
	<hr/>	
Shares	60,000	PEEL v. THOMAS.
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"It was further resolved, that Sir Charles S. Kirkpatrick, Bart., Capt. Charretie, Mr. *Joseph Thomas*, Mr. Coleman, and Mr. Brunton be and are hereby appointed a managing committee (pro tem.), and that they be requested to prepare rules and regulations for working the company; that Mr. Thomas Allison Readwin be and is hereby appointed purser to the company (pro tem.); and that *the offer of Messrs. Kirkpatrick, Brunton, and Readwin, to find the requisite capital to work the mine during the next six months, be and is hereby accepted.*"

It was further proved, that the defendant had attended various meetings of the association as a member of the managing committee; that he had paid 100*l.* on the allotment of shares to him; that he was frequently seen at the mine whilst it was at work; and that he was present at a meeting on the 8th of June, 1854, when it was determined to dissolve the existing company, and to form a new one.

On the part of the plaintiffs, it was insisted that the defendant was liable as a partner or shareholder in the mine, and that his liability was not restricted by limitations imposed upon the partners inter se by the above resolutions.

For the defendant, it was submitted that there was no completely formed partnership, but only a prospective or inchoate partnership, to be formed at the expiration of the six months mentioned in the resolution of the 21st of October, 1853, in the event of the mine being worked to advantage.

The Lord Chief Justice inclined to think that this

1855.

PEEL
v.
THOMAS.

was a mere probationary association, which was not to ripen into a partnership until the expiration of six months; and he directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move that it might be entered for them for the sum claimed, if the court should be of opinion that the defendant was liable as a partner in the mine,—the court to draw such inferences of fact as a jury should have drawn.

Channell, Serjt., on a former day in this term, obtained a rule nisi accordingly. He submitted that the arrangement evidenced by the resolutions of the 21st and 22nd of October, 1853, constituted a partnership at all events for six months; and that, if profits had been made during that period, the defendant would have been entitled to participate therein: and he referred to *Hawken v. Bourne*, 8 M. & W. 703.

J. Brown (with whom was *Byles*, Serjt.) now shewed cause. There was no evidence whatever of partnership. The resolutions of the 21st and 22nd of October, 1853, upon which alone the defendant's liability can arise, shew, that the defendant and his co-adventurers were not to incur the liability of partners until the expiration of the six months limited for the experimental working of the mine, and that during that period Sir Charles Kirkpatrick, Brunton, and Readwin alone were to be responsible. The case, therefore, falls within the principle of *Fox v. Clifton*, 4 M. & P. 676, 6 Bingham 776, 2 M. & Scott, 146, 9 Bingham 115, *Pitchford v. Davis*, 5 M. & W. 2, and that class of cases. [*Jervis*, C. J. What do you understand by the resolution accepting the offer of Sir Charles Kirkpatrick, Brunton, and Readwin, to find the requisite capital to work the mine during the six months? Are they supposed to advance the money out of their own pockets, or are they

merely to act as bankers for the company for that period? I perceive their names are not among the subscribers. If the defendant has advanced his share of the capital, is there not an end of the question?] There is nothing in the resolutions to indicate a loan of money by the three persons named to the company. If those persons were advancing money to the concern, it would be difficult to sustain this defence; for, then they would be working the concern with borrowed capital. But it is submitted that the whole resolutions shew that an immediate partnership was not contemplated; but that the mine was to be worked experimentally during the six months, and that then the adventurers were to have the option to take to it or give it up. [Jervis, C. J. Suppose profit were made during the six months, who would take it?] That is too speculative a question to be easily answered. [Jervis, C. J. Nevertheless, it is one you must meet. Maule, J. Perhaps it was contemplated that six months would be required to reach the stratum where gold was to be found. But, even then the thing would be more valuable than it was when they began. I think you must contend that the only persons to be benefited during the six months, were, Kirkpatrick, Brunton, and Readwin: and it will be very difficult to say that. In *Hawken v. Bourne*, a shareholder was held liable for goods supplied to a mine under very similar circumstances to these.] "There was evidence," there, as Parke, B., says, that the defendant "was a *complete partner* with the directors in working the mines in the manner they were worked." [Maule, J. So, this is a partnership, limited, it is true, but still a partnership. It is like parties agreeing to be partners, with a stipulation that one of them shall in no event be liable beyond 1000*l*.] It is rather an agreement not to bind the parties as partners until the experiment has been first tried for a certain period.

1855.

 PEEL
 v.
 THOMAS.

1855.

PEEL
v.
THOMAS.

Unless the court are prepared to hold that this was a partnership from the first, the verdict cannot be disturbed.

JERVIS, C. J. I for one am prepared to hold that this was a partnership. I think I was wrong at the trial; and I believe my learned Brothers agree with me. It was clearly a partnership of limited extent during the six months. The verdict will, therefore, be entered for the plaintiff for 60*l.* 14*s.* 8*d.*

MAULE, J. I am entirely of the same opinion. There can be no doubt that what was to be done was to be done for the benefit of all the parties.

The rest of the court concurring,

Rule absolute.

WILSON v. MORRELL.

Jan. 12.

A cause and a Chancery suit to which A. and B. were parties, were by an order made at nisi prius referred to an arbitrator. C., who was a party to the Chancery suit, but not a party to the action (which arose out of it), refused to become a party to the reference:—Held, that his refusal was no ground for allowing A. to rescind the order of reference.

THIS was an action brought to try the right to a party-wall. The action arose out of a suit in Chancery to which one Thomas Flight, the owner of the reversion of both the houses which were divided by the wall in question, was a party.

When the cause came on to be tried, it was suggested by the judge that the matter was one that ought to be referred; and accordingly, with the consent of the attorneys and counsel on both sides,—Flight being in court, and not objecting,—the action and the suit were referred to the arbitration of Mr. Serjt. Channell.

Subsequently, however, Flight chusing to withhold

his consent, and the arbitrator feeling a difficulty in proceeding with the reference without it,

1855.

WILSON
v.
MORRELL.

Willes, for the plaintiff, upon affidavits detailing the facts, and stating, amongst other things, that Flight still declined to be a party to the reference, and also declined to make an affidavit, obtained a rule nisi to rescind the order of reference.

Byles, Serjt., and *Norman*, now shewed cause. This is an action brought to try a boundary. Flight, who now obstructs the course of the reference, is the reversioner of the land on both sides. Having thus an interest, it was necessary to make him a party to the suit in Chancery out of which this action grows. This cause coming on for trial, it was agreed by the plaintiff and defendant, their counsel and attorneys,—without any expression of dissent on the part of Flight, who was present in court, and whose attorney was the attorney conducting the action on the part of the plaintiff,—that the action and the suit should be referred. The plaintiff now, under pretence that Flight refuses to become a party to the reference, seeks to get rid of the arrangement entered into on his behalf at the trial by those who were perfectly competent to enter into it. This he cannot be allowed to do. In *Filmer v. Delber*, 3 Taunt. 486, where a similar application was made, upon an affidavit that the attorney, in agreeing to a reference, had acted contrary to the express instructions of his client, Sir James Mansfield said,—“Here is an express agreement to refer properly entered into by counsel and attorney: it is now said that they had no authority to enter into that agreement: if so, the defendant’s remedy is by action against her attorney. There would be no end to these applications, if the court were to interfere. Such interference would lead to

1855.

WILSON
v.
MORRELL.

collusion: when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer." And the rule was refused. Here, Flight can have no real interest in the question. [*Jervis*, C. J. Has not the plaintiff precluded himself from saying that Flight was not a consenting party to the reference? *Maule*, J. This seems to me to be very analogous to the case of *In re Milnes and Robertson*, ante, p. 451, where we held that a bankrupt who had chosen to become party to a reference touching a matter the interest in which had passed to his assignees, was bound to perform an award made personally against him.]

Willes was called upon to support his rule. The arrangement which was entered into at nisi prius, in consequence of something over which the plaintiff has no control, cannot now be carried into effect. It would be idle to proceed with the reference without Flight's being a party to it; and neither the plaintiff nor the court can compel him to submit. It is a mistake to say that he has no interest in the matter. [*Maule*, J. He would not have been made a party to the suit if he had no interest. *Jervis*, C. J. The plaintiff's consent to refer was not given conditionally. He was perfectly aware of all the circumstances at the time he agreed to refer: and nothing has occurred since to alter the position of affairs.] It does not appear to have suggested itself to the mind of any of the parties, or their counsel or attorneys, that Flight's concurrence was necessary. [*Maule*, J. Or, rather, nobody imagined that he would have withheld it. The plaintiff knew that Flight was a party to the Chancery suit. He has agreed to refer something which he *could* refer, and also something which he *could not* refer; and the latter part of his agreement has become inconvenient, or, it may be,

inoperative, in consequence of something the existence of which he was perfectly aware of at the time he entered into the agreement.] The court will hardly allow a proceeding to go on which they must know will be productive of no fruits. It is utterly impossible that the whole matter in dispute can be disposed of in Flight's absence.

1855.

WILSON
v.
MORRELL.
.

JERVIS, C. J. I am of opinion that this rule should be discharged. The plaintiff has chosen to refer the matters in difference between himself and the defendant, as well in the action as in the Chancery suit; and nothing has occurred since he entered into that agreement, which he did not know at the time. I think it would be establishing a very dangerous precedent to permit him to withdraw.

MAULE, J. I also think there is no ground for this rule. Flight, it seems, will have nothing to do with the reference. It is perfectly natural and wise on his part not to concur in a thing which might entail considerable expense on him, without perhaps any corresponding advantage. The plaintiff and defendant, with their eyes wide open, have agreed that the differences between them shall be disposed of by an arbitrator. I see not the smallest reason why they should be allowed to recede from that agreement.

The rest of the court concurring,

Rule refused.

1855.

Jan. 31.

Where a matter is referred to the award of three arbitrators, or any two of them, the two who execute the award must do so at the same time and place, and in the presence of each other,—otherwise it is not what the parties stipulated for, viz. the joint judgment of the two.

PETERSON v. AYRE.

BY a judge's order bearing date the 13th of May, 1853, this cause,—vide antè, Vol. XIII, p. 353,—was referred to the award, arbitrament, final end, and determination of Richard Wilson and John Anson Whealler, *and of such third person as they should, before they proceeded upon the said reference, nominate in writing*, so that they, *or any two of them*, should make and publish their award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as should require the same, or the executors, &c., on or before the 8th of June now next ensuing, or on or before such further or ulterior day as they the said arbitrators, *or any two of them*, should by writing under their hands appoint,—the costs of the cause, and of the reference and award, to abide the event; and that the parties should produce before the said arbitrators, or any two of them, all books, deeds, papers, or writings, in their or either of their custody or power relating to the matters in difference; and that, in the event of either of the parties disputing the validity of the award, or moving to set the same aside, the court should have power to remit the matters thereby referred, or any or either of them, to the re-consideration of the said arbitrators, or to another arbitrator, &c.

The two arbitrators named in the award, before proceeding upon the reference, duly appointed one John Garford “such third person under the said recited order:” and, on the 4th of November, 1853, Wilson and Whealler made an award, which this court considered to be not quite satisfactory; and accordingly the

matter was referred back to the three arbitrators,—vide antè, Vol. XIV, p. 665.

Garford declining to act, Wilson and Whealler afterwards appointed a meeting for the 17th of August last, for the purpose of re-hearing the matter; but, no one appearing on the part of Brown (to whom the plaintiff's interest in the contract had been assigned, they separated, and no further meeting was appointed. On the 6th of November, Wilson and Whealler again made an award, in the same terms as the former, substantially in favour of the defendant.

1855.

PETERSON

v.

AYEE.

Watson, on a former day in this term, obtained a rule nisi to set aside that award, on the ground that it had been executed by the two arbitrators at different times and places. The affidavit upon which the rule was obtained, stated that the deponent had been informed and believed "that the said Richard Wilson and John Anson Whealler did not meet upon the subject of the said reference between the said 17th of August last and the 6th of November; and that the award was prepared by the defendant's attorneys, and signed by the said Richard Wilson and John Anson Whealler at distinct periods and at different places, and in the absence of each other." *Watson* referred to *Little v. Newton*, 2 M. & G. 351, 360, 2 Scott, N. R. 509, 517, 9 Dowl. P. C. 437, *Stalworth v. Inns*, 13 M. & W. 466, 469, 2 D. & L. 428, and *Wade v. Dowling*, 4 Ellis & B. 44. Coleridge, J., in this latter case, says,—“One fundamental principle is, that the courts are bound to give to the parties what they stipulate for as the condition for their submission. The parties say, ‘We refer this matter to three arbitrators; we wish to have the opinion of all the three, at any rate the opinion of two, up to the last moment.’ It is well pointed out in *Stalworth v. Inns*, that, up to the last moment, something may occur to change the opinion

1855.

PETERSON

v.

AYRE.

of the arbitrator. Is, then, this condition carried out when the arbitrators execute at different times and places? I think not. When is the first signature to take effect? One party signing at London on one day, the other at Bristol on another day, when have they executed? It cannot be said that the award was executed on the first day; for, till the second day, it was in suspense; and the first signature can take effect only after the second is affixed: but, in the meantime, the party first signing might alter his mind: perhaps he has signed for a reason which, if communicated to the other arbitrator, might induce the latter to differ. These possibilities shew that there is good reason for requiring that the award should be signed simul et semel." Wightman, J., says: "The submission is, to the award of any two or more who make the award before a certain time. One makes at one time; another at another. When is there the signature of the two? A week or a fortnight may intervene between the signatures; yet clearly there is not the signature of the two till both have signed: nor, till then, is there the final signature of one, since matters may occur in the interval which may alter his view. The parties have a right to the joint judgment of the two exercised upon consideration up to the last moment." And Erle, J., says: "This is not the award for which the submission stipulates. That was to be an award made upon the joint judgment of arbitrators considering all that they had heard up to the giving of their judgment. If an execution at two different places were held good, we should get to what seems in fact to have been made here, an award by one arbitrator conditional upon the assent of the other. That is not a joint award. I think the possibility of change of opinion is exemplified by cases which I have known, where a single arbitrator, having made his award, has afterwards taken a different view, and has

himself made an affidavit to get his award set aside. That surely may equally well happen when there are two arbitrators, and might be produced by fresh light thrown upon the question at the last conference." (a)

1855.

 PETERSON
v.
AYRE.

Byles, Serjt., now shewed cause. The affidavit upon which the rule was granted does not in terms state that the award was in point of fact executed by the two arbitrators at different times and places: the deponent merely states that he was so informed and believes: he does not even state from whom he derived his information. [*Maule*, J. He states quite enough to call upon you for an answer. Does your affidavit state that the two arbitrators signed the award in the presence of each other?] It states that an appointment was duly served upon John Garford, that Wilson and Whealler would attend on the 6th of November last at the counting-house of Whealler, in Mark Lane, at 12 o'clock at noon, to sign the said award, and that "the deponent attended at the counting-house of the said John Anson Whealler on the 6th of November last, at the house appointed for the said meeting, and soon afterwards the said Richard Wilson and John Anson Whealler, *in the said counting-house,** signed the said award in the presence of this deponent, and this deponent *then, and in the said counting-house,** signed the said award as the attesting-witness to the signatures of the said Richard Wilson and John Anson Whealler, and that he this deponent *then and there** signed the same in the presence of the said Richard Wilson and John Anson Whealler: and this deponent further saith, that it is not true, as stated in the affidavit sworn in this cause (used on the motion),

* The words
in italics were
interlined in
the affidavit.

(a) The rule was also moved of the intended meeting: but on the ground that the arbitrators had omitted to give the plaintiff (or Brown) due notice that the court did not grant it upon that ground.

1855.

PETERSON

v.

AYRE.

that the said award was signed by the said Richard Wilson and John Anson Whealler at different periods and at different places, and in the absence of each other; *for*, this deponent saith that the said award was signed by the said Richard Wilson and John Anson Whealler as hereinbefore stated, and not in any other manner." [Maule, J. It seems pretty clear from that affidavit, that the award was executed by the two arbitrators in the same place, but at different times, and in the absence of each other, though in the presence of the attesting-witness. The rule is pointed to the objection; and the affidavit does not exactly answer it, but skilfully shaves round it.] It is submitted that that is putting too strict a construction upon the affidavit. [Jervis, C. J. The attention of the party who makes the affidavit is drawn to the fact that the two arbitrators did not execute the award in each others' presence. Why did he not, if the fact were so, state shortly and distinctly that the two executed it together?] If the former part of the affidavit leaves the matter in any doubt, the latter part clears it up.

MAULE, J. I have not the smallest doubt about the fact. It is quite obvious, from the interlineations therein, that the affidavit has been very carefully constructed, and that these two arbitrators did not execute this award in the manner required by law, otherwise the fact would have been stated in a direct and simple manner. The matter must go back to them again.

The rest of the court concurring,

Rule accordingly.

1855.

GILLOW v. RIDER.

Jan. 31.

LUSH, on a former day in this term, obtained a rule nisi to set aside an order of Crowder, J., referring an attorney's bill for taxation, with an order for payment, under the 6 & 7 Vict. c. 73, s. 37, on the ground that such order was obtained upon insufficient materials, and upon an ex parte application.

An order for the taxation and payment of an attorney's bill (after a previous order to change the attorney) cannot be made upon an ex parte application.

Piggott now shewed cause. The order is perfectly regular. [*Jervis*, C. J. I find, upon inquiry of the Master, that the practice is, to hear both parties, and not to make these orders on an ex parte application.] This being an application after an order to change the attorney, there could be no necessity for a summons to shew cause, inasmuch as the retainer could not be disputed.

JERVIS, C. J. The order is to be made "with such directions and subject to such conditions as the court or judge making such reference shall think proper." The judge has to exercise a discretion. There must be a previous summons.

The rest of the court concurring,

Rule absolute.

1855.

Jan. 26th.

The discretion of a judge at Chambers to make an order in an action of detinue, under the 78th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, for the delivery up of the chattel detained, is subject to review by the court.

Such an order cannot properly be made in a case where by agreement of the parties the jury are discharged from finding the value of the chattel.

CHILTON, Assignee of WILLIAM PHILIP MASTERS CROFT, an Insolvent Debtor, *v.* CARRINGTON and WHITEHURST.

THE 78th section of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125,—enacts that “the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that, if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff’s bailiwick, till the defendant renders such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant’s goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant’s goods the damages, costs, and interest in such action.”

An action of detinue had been brought by the plaintiff as assignee of the insolvent, Croft, to recover a lease of certain premises in Great Windmill Street, Haymarket, and also certain wine, spirit, and beer licences, which had been deposited by Croft with the defendants as security for an advance of 150*l.* made by them to him: see a report of a former stage of the cause, *antè*, p. 95.

At the trial, before Cresswell, J., at the sittings in London after last Trinity Term, it was proved that the plaintiff had tendered to the defendants the 150*l.*, and the interest due thereon, and demanded the lease, which

the defendants refused to deliver up. The jury returned a verdict for the plaintiff, with 60*l.* damages for the detention of the lease; and they were, by consent, discharged from finding the value of the lease.

1855.

CHILTON
v.
CARRINGTON.

The agreement entered into at the trial appeared upon the *postea* thus,—“And the said parties within named consent that the jurors shall be discharged from finding the value of any of the said goods and chattels, and that neither party shall be prejudiced by such consent, or by the want of such finding; and the jurors accordingly are discharged by such consent from finding, and do not find, the value as aforesaid.”

Upon the plaintiff's application, Cresswell, J., afterwards made an order upon the defendants, upon the supposed authority of the section of the Common Law Procedure Act, 1854, above set out, to deliver up the lease to him.

Montague Smith, on a former day in this term, obtained a rule nisi to rescind that order, on the ground that this was not a case to which the 78th section of the statute was intended to apply.

Aspland now shewed cause. No appeal lies from the decision of a judge under this section. The general rule laid down in *Rex v. Almon*, Wilmot's Notes, 264, and recognized and acted upon by this court in *Darrington v. Price*, *antè*, Vol. VI, p. 309, does not apply where the power to dispose of the matter is substantively given to a judge at Chambers. [*Maule*, J. The power to make an order to charge stock, under the 1 & 2 Vict. c. 110, ss. 14, 15, is expressly given to a judge at Chambers; and it has been held to be reviewable by the court. (a)] It was not necessary that the jury should

(a) See *Robinson v. Burbidge*, *antè*, Vol. IX, p. 289.

1855.
 CHILTON
 v.
 CARRINGTON.

assess the value of the lease : *Williams v. Archer*, antè, Vol. V, p. 318 : and therefore the absence of an assessment of the value was immaterial. By refusing the sum tendered, the defendants *at law* lose the benefit of their security : and the court has no equitable powers, except where they are expressly given. [*Jervis*, C. J. The order to deliver up the chattel is given in lieu of the option which the defendant had under the old law, of retaining the chattel on paying the value assessed by the jury. Suppose the value had been assessed at 500*l.*, would the defendants have paid the 500*l.* without reference to the mortgage?] The charge was absolutely gone : the tender was equivalent to payment. Littleton, § 238, says,—“Note, that, in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit and fully discharged for ever afterwards.” Upon this Lord Coke observes,—“This is to be understood that he that ought to tender the money is of this discharged for ever to make any other tender ; but, if it were a duty before, though the feoffor enter by force of the condition, yet the debt or duty remaineth. As, if A. borroweth 100*l.* of B., and after mortgageth land to B. upon condition for payment thereof, if A. tender the money to B., and he refuseth it, A. may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But, if A., without any loan, debt, or duty preceding, enfeoff B. of land upon condition for the payment of 100*l.* to B., in nature of a gratuity or gift, in that case, if he tender the 100*l.* to him according to the condition, and he refuseth it, B. hath no remedy therefor ; and so is our author in this and his other cases of like nature to be understood.” In *Coggs v. Bernard*, 1 Lord Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt, 13, speaking of lost pledges,

Lord Holt says,—“If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined.” In the notes to that case, in 1 Smith’s Leading Cases, 100, it is said,—“After the debt has been discharged or *tendered*, it of course becomes the pawnee’s duty to return the pawn; *Isiack v. Clark*, 2 Bulstr. 306; *Anonymous*, 2 Salk. 522; Bull. N. P. 72. And, if the pawnor have, as he may do, assigned his property in the pledge, subject to the pawnee’s rights and special property, the assignee will have, it is said, the same right as the pawnor, both in law and equity: *Kemp v. Westbrook*, 1 Ves. sen. 278, *Franklin v. Neate*, 18 M. & W. 481: whereas, it is clear that the assignee of the equity of redemption in a thing mortgaged could have no rights at law. There *may*, however, be a *mortgage*, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage. If the pawnee, after payment or *tender*, insist upon retaining the goods pledged, he is a wrong-doer, and becomes liable to an action, and chargeable with any damage which may afterwards happen to the pledge, whether with or without his default: *Anonymous*, 2 Salk. 522; Comyns’s Digest, *Mortgage* (B.).” In *Clark v. Gilbert*, 2 N. C. 343, 2 Scott, 520, the defendant held a lease on which he had a lien for 300*l.* as attorney of S.: a commission of bankrupt was issued against S. in December, 1829; the defendant acted as attorney under that commission; and, in 1831, after notice of a petition to supersede it, he joined with the assignee under the commission in a sale of the lease, and out of the proceeds was paid the 300*l.* due to him from S. The commission of bankrupt having been superseded in 1832, for want of

1855.

CHILTON
v.
CARRINGTON.

1855.

CHILTON
v.
CARRINGTON.

a sufficient petitioning-creditor's debt, and a new commission having issued,—it was held, that the defendant was liable to refund the 300*l.* in an action for money had and received to the use of the assignee under the second commission, and also money received in 1831, for rent &c. accruing to S. In giving judgment, Tindal, C. J., said: "As to two of the sums in dispute, viz. the sum of 300*l.*, and the sum of 3*l.* 14*s.*, it appears they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now, that lease, at the time of such sale, was in the possession of the defendant as a pledge or security for the payment of his demand against the bankrupt; being either in his possession as solicitor, under a claim upon it for his lien which the law gives him; or having been expressly deposited with him as a security for his demand, according to the evidence of Stevens. In either case, the right and power of the defendant over the lease was precisely the same: he had the right to retain the lease in his possession until his demand was paid, and so far, by means of the possession of the lease, to enforce payment of his demand: but he had that right only: he had no right to sell the lease, and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it, without either payment of the demand, or a *tender and refusal*, which is equivalent to payment." This question is, in effect, disposed by the observation of Maule, J., *antè*, p. 105, where he says,—“As to the supposed equitable claim, nothing has been cited on the part of the defendants to shew that the rights of the defendants would have been at all different if the question had arisen directly between them and Croft, the pledgor. No court of equity would have interfered with the right of the pledgor to have the note and the lease delivered up to him on payment or *tender* of the amount of the note and interest.” Here,

the plaintiff has been guilty of no default, no laches; and the court will not substitute a new contract for the general one which the law will in such a case imply. Upon the money being tendered, the defendants ought to have returned the lease, their special property therein being determined. The rule is thus stated in Story on Equity Jurisprudence, § 1032,—“In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But, if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and, in case of the death of the pledgor without such a demand, his personal representatives may redeem. (a) Generally speaking, a bill in equity to redeem will not lie on the behalf of the pledgor or his representatives, as his remedy upon a tender is at law. But, if any special ground is shewn, as, if an account or a discovery is wanted, or there has been an assignment of the pledge, a bill will lie.” (b) It is clear, therefore, that the plaintiff has no remedy in equity, but only at law. [*Maule, J.* By agreeing that the jury should be discharged from assessing the value of the lease, have not the parties in effect agreed that such an order as this should not be made?] It is submitted that they have not. The order is a perfectly valid order.

1855.

CHILTON
v.
CARRINGTON.

Montague Smith and Raymond, in support of the rule.

(a) Citing 4 Kent. Comm. Lect. 58, p. 138 (4th edit.); Story on Bailments, § § 308, 345, 346, 348; Glanville, Lib. 10, cap. 6, 8; *Cortelyou v. Lansing*, 1 Cain. Cas. Err. 200, 203 (American); *Demandray v. Metcalf*, Pre. Ch. 419, 2 Vern. 691, 698, Gilb. Eq. R. 104; *Vanderzee v. Willis*, 3 Bro. Ch. R. 21; *Kemp v. Westbrook*, 1 Ves. sen. 278.

(b) Citing *Kemp v. Westbrook*, 1 Ves. sen. 278; *Demandray v. Metcalf*, Pre. Ch. 419, 420; *Jones v. Smith*, 2 Ves. jun. 372.

1855.

CHILTON

v.

CARRINGTON.

This is not an order which the court, in the exercise of a sound discretion, would think it right to make. [*Williams, J.* It is obvious that a very large discretion must be given to the judge under s. 78.] All the circumstances are to be taken into consideration; and the judge, or the court, is to exercise the same sort of discretion which a court of equity would exercise. This is not the case of a mere pledge: it is a mortgage by a written agreement, by which Croft deposits the lease for a present advance of 150*l.*, with a power of sale in the event of any of the conditions upon which the deposit was made being broken. [*Jervis, C. J.* Under the old system, might there not have been a special finding, that the defendants were guilty of the detention, with an award of damages for the detention, the jury being by consent discharged from finding the value of the chattel? And would not the defendant in that case have waived the option? In that case, the judgment simply would have been to deliver up the chattel, and pay the damages.] If the value had been assessed, the defendants would have been entitled to credit for the 150*l.* [*Maule, J.* You insist, that, notwithstanding the tender and refusal, the defendants are still entitled to hold the lease as a security?] In equity, clearly. [*Williams, J.* If you are right, the plaintiff ought not to have succeeded in the action.] The existence of the debt would be an equitable answer to the value, though the action might well lie for damages for the detention after the tender. The 78th section of the 17 & 18 Vict. c. 125, gives the court the power of compelling right to be done. The defendants are in a position to go into equity to convert their equitable into a legal mortgage. In *Whitworth v. Gaugain*, 1 Phill. Ch. Cas. 728, it was held, that, notwithstanding the statute 1 & 2 Vict. c. 110, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in

1855.

 CHILTON
 v.
 CARRINGTON.

equity to enforce his security, against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit, without notice of the mortgage. "By the equitable mortgage," said the Lord Chancellor (Lord Cottenham), "the plaintiffs acquired a special lien upon the property: they might, through the medium of this court, have compelled a sale of it for the payment of their debt, or they might, by virtue of the engagement for that purpose, have obliged their mortgagor to convert the equitable into a legal mortgage. The plaintiffs had thus an interest in the premises to the amount of their debt, and just as strong an interest, to use the words of Lord Chief Baron Richards, in *Casberd v. The Attorney-General*, 6 Price, 411, as if a mortgage had been executed." What is the effect of a tender, in equity? [*Williams, J.* Had the power of sale come into existence at the time of the tender?] The fourteen days' notice provided by the agreement (a) had been given, but the tender was made before the fourteen days expired. [*Maule, J.* Did not the defendants, by consenting that the jury should be discharged from assessing the value, implicitly consent that such an execution as could issue should issue upon the verdict?] The defendants never intended to give up their lien for the 150*l.* It is a charge upon the estate. In *Grugeon v. Gerrard*, 4 Y. & C. (Exch.) 119, Maule, J., says: "A mortgagee is not bound to accept the mortgage money when tendered, unless reasonable notice has been given of the intention to pay him off; and, even after notice, he may refuse to receive the sum tendered, and dispute the account; and the only remedy of the mortgagor will at last be, to file a bill for redemption. If, indeed, on such a bill, it should appear that the mortgagor, after giving to the

(a) Antè, p. 97.

1855.
CHILTON
v.
CARRINGTON.

mortgagee six months' notice of his intention to pay off the mortgage, had actually tendered to him the full amount of principal, interest, and costs, and that the mortgagee had obstinately refused to receive it, and so had rendered a suit necessary, the court would probably fix the costs of the suit on the mortgagee. Still, however, he must, until actually paid off, retain the character of mortgagee, with all the rights incident to it." [*Cresswell*, J. As far as concerns the jurisdiction under section 78, the judge would have nothing to do with the equity, if the jury had found the value. *Jervis*, C. J. Ought the judge to have told the jury, that, in assessing the value of the lease, they might take into their consideration the equitable charge? If that is so, the order is wrong.] The effect of a tender in equity is much more reasonable than the rule of law. The court will in this case, it is submitted, act upon the principle laid down by Lord Abinger, in *Phillips v. Clagett*, 11 M. & W. 84, 91,— "It has been the practice of courts of law (especially in modern times), where they see that justice requires the interference of a court of equity, and that a court of equity would interfere,—in every such case to save the parties the expense of proceeding to a court of equity, by giving them the aid of the equitable jurisdiction of a court of common law, to enable them to effect the same purpose." It would be manifestly inequitable and unjust to compel the defendants to give up the lease in this case without getting back their advance, or being driven for redress to a court of equity.

JERVIS, C. J. It seems to me that this rule ought to be made absolute. The view I take of the case renders it unnecessary for me to give any opinion either upon the construction of the 78th section of the statute or upon the extent of the equitable jurisdiction of the court. The *postea* shews that some agreement was

come to at the trial. I regret very much that the counsel cannot agree as to what that agreement was: and the parties have not thought fit to instruct the court on the matter by affidavit. Being, therefore, wholly unable to see whether the order is right or wrong, I think it ought to be set aside.

1855.

CHILTON
v.
CARRINGTON.

MAULE, J. I also think this rule should be made absolute. I do not quite enter into the difficulties felt by my Lord Chief Justice. I think we can sufficiently see upon the instrument before us what was the agreement between the parties. They agreed that the jury should conduct themselves in the manner stated in the *postea*, viz. that they should find the amount of damages sustained by reason of the detention of the lease, and should be discharged from finding the value of the lease itself,—subject to the condition that neither party should take advantage of the want of an assessment of the value of the chattel for which the action is brought, so as to prevent the plaintiff's obtaining the damages according to the finding of the jury. It is not a verdict properly found under the direction of the judge. That being so, if I were called upon to decide positively whether such an order as that now under consideration could be made under the 78th section of the 17 & 18 Vict. c. 125, I should be disposed to say that the case did not fall within that provision; because it seems to me that the 78th section was intended to apply to a regular and legal finding. Now, the regular and legal finding here would be, a finding of so much for the value of the lease, and so much by way of damages for its detention. Before the passing of the Common Law Procedure Act, in detinue the defendant had the option to retain possession of the chattel, paying the sum at which the jury thought proper to assess its value. That was felt to operate hardship on the plaintiff in many

1855.

CHILTON
v.
CARRINGTON.

cases. The plaintiff might not be willing to lose the article: it might have a value considerably larger in his estimation than that fixed by the jury. To prevent that inconvenience and hardship, the statute provides, not that the option shall in all cases be taken away, but "that the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel on paying the value assessed,"—only in certain cases,—intrusting it to the discretion of the court or a judge to determine according to the circumstances of each case whether or not it is fit to order that the chattel itself shall be restored. The effect, therefore, of the 78th section, is, to enable the court or the judge to make such an order where it would be unjust to allow the defendant to have the option, and where he can, and in the opinion of the court or judge ought to, restore the chattel in specie. That is a provision entirely dealing with a case of option before the statute. If the value of the chattel is not assessed by the jury, the course provided by the 78th section is not applicable. The agreement entered on the *postea* means no more than this, that the absence of an assessment of value shall not have the effect of preventing the verdict from taking effect so far as it legally can take effect. The jurisdiction of the judge under s. 78 being solely applicable to a case where the value is found, I think such an order as that section contemplates cannot be made where such value has not been found. But, supposing the order *could* have any operation at all, it seems to me that this is not a case in which the discretion should have been exercised by the judge. Where parties have come to an agreement such as this, the court may very properly say,—as has been said in cases

where a certificate for costs has been asked for when a verdict has been taken by consent,—“ You have agreed that a verdict shall be entered in a particular way : we cannot make a new agreement for you.” The parties have agreed to stand upon the record as they have framed it. That being so, I do not think it at all a proper thing that the court or a judge should be called upon to make an order embodying terms not found in the agreement, or that they ought to do so even if it were competent to them to do it. For these reasons, I concur with the Lord Chief Justice in thinking that this rule should be made absolute.

1855.

CHILTON
v.
CARRINGTON.

CRESSWELL, J. My Lord and my two learned Brothers being, as I understand, agreed that the order made by me in this case should be rescinded, the rule will of course be made absolute. I am glad that they have arrived at this conclusion, as it relieves me from entering upon a discussion of the agreement entered into by the counsel at the trial, and of the conclusions which I drew from it.

WILLIAMS, J. I also am of opinion that the rule to set aside my Brother Cresswell's order should be made absolute. I regret very much that we cannot put an end to the litigation between these parties, and make the plaintiff pay the 150*l.*, which he ought in justice to pay. The order clearly must be set aside, as there were no materials before the learned judge to warrant it. It is unnecessary to say whether or not the jury might, in estimating the value of the lease to the plaintiff, have taken into their consideration the equitable charge upon it, though I incline to think that in good sense and justice they ought to be able to do so. The only question for us to consider, is, whether my Brother Cresswell had power under the statute to make the

1855.
CHILTON
v.
CARRINGTON.

order he did. I think he clearly had none, because the consent of the parties to discharge the jury from finding the value,—the parties overlooking the consequences to which such consent would lead,—makes the record utterly unmanageable. It is impossible, that, upon the finding as it now stands, such a judgment can be pronounced, or such an execution issue, as could issue at common law. The only consideration that could at all justify such an order as this, would be, that the absolute consent given at *nisi prius* precludes the defendants from objecting to it. But I cannot find that there was any such intention. The 78th section was intended to enable the court or a judge to deprive the defendant of the option he had before, of retaining the chattel,—an option which in this case did not exist. We can under the circumstances only set aside the order.

Rule absolute. (a)

(a) A second action was brought to recover the deed, and is now pending.

1855.

In re BIRCH.

Jan. 31.

NEAR to the town of Scarborough, in Yorkshire, is a piece of land, called the South Sands, which is, and which immemorially has been, part of the sea shore, and which is, and immemorially has been, covered by the tide of the North Sea.

On the 14th of October last, after the tide had receded therefrom, Thomas Birch, who was a dealer in shells, placed on a part of the said South Sands, that is to say, on a part thereof which is, and immemorially has been, betwixt the ordinary flux and reflux of the tide, a small truck or stand, with a few shells and pebbles thereon for sale. For having so done, he was shortly afterwards served with the following summons:—

“Improvement Commissioners’ Office, Scarborough,

“October 21st, 1854.

“Act 45 G. 3, c. xciv. Sess. 1805.

“I hereby give you notice that a meeting of the improvement commissioners will be held in the Savings Bank, on Tuesday, the 24th instant, at 10 o’clock in the morning, when a charge will be brought against you for violating the conditions set forth in the Scarborough improvement act and bye-laws.

“By order. J. S. Whitlock,

“Clerk and surveyor.

“Mr. Thomas Birch.”

In obedience to this summons, Birch attended at the time and place appointed, for the purpose of making his defence against the above charge, and served upon the clerk of the said commissioners the following notice:—

“To the commissioners for the better paving, cleans-

VOL. XV.—C. B.

C C C

To entitle a party to a prohibition to restrain commissioners under a local improvement act from proceeding to enforce a penalty for an offence against the act, he must distinctly shew that they are acting without jurisdiction: it is not enough to shew that it is doubtful, upon the act of parliament, whether their jurisdiction extends to the place where the alleged offence was committed. “Public place,” meaning of.

1855.

In re
BIRCH.

ing, lighting, watching, and regulating the township of Scarborough, in the county of York.

“Gentlemen,—I hereby give you notice that the supposed offence for which you have summoned me, was not committed within your jurisdiction; and that you will, and each of you will, be held responsible for the consequences of your illegal proceedings. Dated this 24th of October, 1854.

“Thomas Birch.”

At the time and place mentioned in the summons, Birch was charged before the commissioners with having on the 14th of October placed a truck or stand, with shells and pebbles upon it for sale upon the part of the South Sands above described. Birch claimed to be heard against the charge, but the commissioners refused to hear him, one of them saying that they had something else to do than listen to him; and, without allowing him, either then or at any other time, an opportunity of being heard against the charge, he was convicted of the supposed offence, and fined 2*s.* 6*d.*, upon an assumption that he had, by placing his truck or stand on the part of the sands above described, been guilty of a violation of the Scarborough improvement act, and bye-laws made in pursuance thereof.

On the 5th of December last, Birch was served with a summons, as follows:—

“Borough of Scarborough, in the county of York.

“To Thomas Birch, of William Street, in the township of Scarborough, in the county of York, dealer in shells.

“Whereas, information hath this day been laid before me, the undersigned George Willis, Esq., the mayor, one of Her Majesty’s justices of the peace in and for the borough of Scarborough, and the liberties thereof, in the county of York,—For that you, Thomas Birch,

unlawfully have refused to pay on demand the sum of 2*s.* 6*d.*, being the amount of a certain fine or penalty incurred by you for an offence against a certain act of parliament made in the session of parliament held in the forty-fifth year of the reign of King George the Third, intituled 'An act for paving and otherwise improving the streets and other places in the township of Scarborough, in the North Riding of the county of York, and for licensing hackney-coaches, and establishing other regulations in the said township;' and which fine or penalty was imposed on you by the commissioners acting under that statute, at a meeting duly convened and held by them for the purposes of the said act, within six calendar months last past, to wit, on the 24th of October, 1854, contrary to the form of the statute in such case made and provided: These are, therefore, to command you, in Her Majesty's name, to be and appear personally at the Town-Hall in Scarborough aforesaid, on Wednesday, the 6th day of December instant, at 11 o'clock in the forenoon, before such justices of the peace for the said borough as may then be there, to answer to the said information, and to shew cause why a warrant should not be issued for recovering the said fine or sum of 2*s.* 6*d.* by distress of your goods and chattels, together with the costs attendant thereon. Given under my hand and seal at the borough of Scarborough aforesaid, this 5th day of December, 1854.

"George Willis, Mayor."

In obedience to this summons, Birch duly appeared before the mayor to defend himself against the matter contained therein; but the hearing was from time to time adjourned.

On the 12th of December last, a summons was taken out on behalf of Birch, calling upon the Scarborough improvement commissioners and George Willis to shew

1855.

 In re
BIRCH.

1855.

In re
BIRCH.

cause why a writ of prohibition should not issue, to prohibit the said commissioners and the said George Willis from further proceeding in the hearing of the above complaint, and otherwise acting in the premises. On the 21st, an order was made by Jervis, C. J., by consent, staying the proceedings until the sixth day of Hilary Term,—“the said Thomas Birch to be at liberty to make such application to the court as he might be advised: all parties undertaking that no question should be raised as to the form or regularity of the proceedings taken by either party; and that the only question to be discussed should be, whether the commissioners had jurisdiction under the statute in the locus in quo; the costs of that order, and incident thereto, to abide the event of the argument of any rule which might be obtained on the above application.”

Upon affidavits disclosing the above facts, and also stating that the said South Sands were and from time immemorial had been part of the manor of Scarborough, and the property of the lords of the said manor; that the part of the said South Sands whereon Birch's truck or stand was so placed as aforesaid, and for which he was convicted and fined as aforesaid, was not at the time when his supposed offence was committed, nor is, “a street, lane, alley, or public place or public passage, in the township of Scarborough, within the meaning of the said act, and was not at the time of the said supposed offence, nor is it, as the defendant had been advised and believed, within the jurisdiction of the said commissioners;” that Birch had, in common with many other inhabitants of Scarborough, always pursued his said calling on the said part of the said sands, until October in last year, without complaint or molestation, and had always done so openly and without leave of any one, and as of right, as he believed; and that he had never caused any obstruction, nor done anything

thereon except the act for which the proceedings in question were threatened, and other acts of a like kind, which, as he had been advised and believed, he had a right to do without any one's leave.

1855.

In re
BIRCH.

Atkinson, Serjt., on a former day in this term, obtained a rule nisi in the terms of the summons of the 12th of December, on the ground that the Scarborough improvement commissioners had no jurisdiction over the locus in quo. He referred to *Blundell v. Catterall*, 5 B. & Ald. 268. (a)

S. Temple now shewed cause. (b) The act of parlia-

(a) When the motion was first made, the affidavit insufficiently stated the original complaint against the applicant, and the ground upon which the commissioners had imposed the fine upon him; but the court permitted it to be amended in this respect.

(b) The affidavits filed in opposition to the motion were those of William Tindall, the collector of the Scarborough improvement rates, and of Thomas Purnell and William Rowntree, two of the commissioners.

Tindall's affidavit stated, that the deponent had known and been well acquainted with the town of Scarborough for many years, and that Scarborough is much frequented during the Summer months by people from all parts of the kingdom, who resort thither for the purpose of sea-bathing and drinking the mineral waters:

That the management of the paving, lighting, and cleansing of the town of Scarborough is vested in the commissioners for the improvement of the town of Scarborough, and that they have expended large sums of money in effectually draining, cleansing, paving, and lighting the same, and have during the past year, at a cost of upwards of 1700*l.*, collected in an iron tube or tunnel inserted in the South Sands, at some depth from the surface, carried through them, and covered in, and by that means conveyed away to a part considerably distant, the drainage of the town, which had before been discharged upon the surface of the sea sands, and near to the place appropriated for bathing, and which drainage was from the increasing size of the town becoming very disagreeable and offensive, and likely to prove injurious to the

1855.

In re
BIRCH.

ment in question,—the 45 G. 3, c. xciv, recites, that,
“whereas the several streets, lanes, alleys, and public

interests of Scarborough as a
sea-bathing place :

That the part of the said
sands usually known by the
name of the South Sands, forms
a bay from which the town of
Scarborough rises in a succe-
sion of public streets ; that the
houses forming the said streets
extend down from the adjoining
rising ground on to the
beach, of which the said shore
is a part, and that a very large
proportion of the said houses
open and have their public ac-
cess to the said beach, and that
to the said proportion of houses
the principal communication is
by passing and re-passing upon
and over the said beach ; and
that, at some states of the tide,
the sea reaches up to the said
houses ; and, not only the said
houses, but also a large pro-
portion of the houses forming
the streets of the town as it
ascends the rising ground from
the said bay and beach have
been, until the before-men-
tioned improvement made by
the said commissioners, drained
by emptying their drains and
sewers upon the surface of the
said sands :

That Scarborough is a sea-
port, and that, at one point or
end of the said bay is the pub-
lic harbour of the said port,
which harbour is composed of
certain quays, piers, and jet-
ties, some of them extending
considerably beyond the ordi-
nary low-water mark of the

tides of the North Sea ; and
that a large proportion of the
carts and carriages communi-
cating with and carrying goods
and merchandize and other
materials from or to the said
quays, piers, and jetties, or
from or to the ships or vessels
resorting to the said port, and
lying within the said harbour,
ordinarily pass and re-pass
over portions of the said beach
and shore of the said bay and
South Sands :

That there are several pub-
lic highways leading to and
from the town of Scarborough
and various towns and places
in the adjacent country, one
of the termini of each of which
is upon the said South Sands ;
and that one public highway
leading to and from the town
of Scarborough to and from
the towns of Filey, Bridling-
ton, and many other towns
and villages, and known by the
name of the Filey Road, has
one of its public termini on the
said South Sands near to the
place where the said Thomas
Birch kept his said truck as in
his affidavit mentioned, and
from which said towns and
villages the principal and most
convenient communication with
many of the said houses, and
with the said harbour, is over
and across the said South
Sands, and that part on which
the said Thomas Birch kept
his said truck as aforesaid :

That the whole of the bay

passages in the township of Scarborough, within the borough and parish of Scarborough, in the north riding

1855.

In re
BIRCH.

commonly called and known by the name of the South Sands, on one portion of which said sands the said truck of the said Thomas Birch was placed as aforesaid, has from time whereof the memory of man is not to the contrary been used and enjoyed by great numbers of persons resorting from all parts of the kingdom to the said town of Scarborough in the bathing season, as a public promenade for persons on foot and on horseback and in carriages, at certain hours of the day, both during and after the usual hours of bathing :

That the said commissioners have formed a flagged foot-path, and made a good road adjoining part of the said sands, and that they light and repair the same and also all the streets and houses which adjoin to and abut upon the said sands, and lay and receive rates from the occupiers of houses and property adjoining thereto, and also light the said sands and the harbour, and a part of the said piers, and receive rates in respect of the dwelling-house of the harbour-master of the said port, situate on one of the said piers, and also from or in respect of other buildings situate on the said sands, harbour, and piers :

That the said commissioners employ and pay a person to collect and remove the offal, filth, and refuse which from time to time is deposited and

cast on the said sands and foreshore, so as to prevent any annoyance to parties frequenting the same ; and that the place where the said Thomas Birch caused the said obstruction, and which he was ordered to remove, and fined for not removing, was near to the place which is set apart for the ladies to bathe, and on that part of the sands which after the usual bathing hours is most frequented for walking, riding, and driving ; and that, unless proper control can be exercised by some public body, a most serious obstruction and impediment will take place to the user of the said public place as hitherto enjoyed :

That the place on which the said Thomas Birch placed and kept his said truck, as in his affidavit mentioned, was in the township and borough of Scarborough aforesaid ; and that, before the said Thomas Birch was summoned before the said commissioners, as in his affidavit mentioned, he had been duly warned and ordered, by authority of the said commissioners, to remove his said truck, which he persisted in refusing or neglecting to do ; and that his continuing to retain his said truck in the said place, was, in the judgment of the commissioners, contrary to the statute in that case made and provided, and the public policy and well being of the town and borough of Scar-

1855.

In re
BIRCH.

of the county of York, are in many places incommodious and unsafe for passengers, being ill paved, and not sufficiently cleansed, lighted, and watched, and are subject to various nuisances, annoyances, encroachments, and obstructions, and it would greatly tend to the convenience, benefit, and safety of the public, as well as the owners and inhabitants of houses within the said township of Scarborough, and to all persons resorting thereto, if the streets, lanes, alleys, and public passages therein were properly paved, cleansed, lighted, watched, and regulated, and all nuisances, annoyances, encroachments, and obstructions therein removed and prevented; and it would also greatly tend to the convenience and benefit of the public if the hackney-coaches, chairs, porters, coal-carriers, water-carriers, trucks, carts, and other carriages within the township of Scarborough aforesaid, were licensed and put under proper regulations;” and the first section appoints commissioners for carrying the act into effect,—amongst others, the bailiffs of the borough for the time being, for whom the mayor is now substituted. Whether Birch was guilty of the offence for which he was fined by the commissioners or not, is

borough, and that the said place in which the said truck was so placed as aforesaid, was, in the judgment of the said commissioners, a public place within the meaning of the said act of parliament:

And that, although there is no manor of Scarborough, yet that the corporation of Scarborough are or claim to be owners, not only of the said shore between high and low-water mark, but also of the soil and freehold of all the antient public highways and streets of the said town; and the said commissioners have

exercised all the powers of the said act as herein set forth, with the full knowledge, and without any complaint or protestation on the part of the said corporation.

The other affidavits stated, that Birch was duly summoned and had every opportunity afforded him of being heard in answer to the charge before he was fined; and that similar fines had previously been imposed upon other parties for obstructions of the like character with that for which Birch was summoned.

not for the court to determine: the only question here is, whether the commissioners had jurisdiction over the spot where the supposed offence was committed. Now, the act of parliament necessarily confers upon them very large powers. Thus, the 12th section authorises them to cause lamp-irons or lamp-posts to be put up, affixed into, upon, or against the ground adjoining to, or the walls or pallsades of any of the houses, tenements, or buildings already built, or hereafter to be built, within the said township of Scarborough, as they should think proper or convenient. The affidavits shew that there are houses on the locus in quo where lamps are affixed under the authority of that section. The 13th and 16th sections provide for the removal of ashes, filth, &c., from the streets, lanes, or other public passages or places. The 17th section, "in order that the streets, lanes, and other public passages and places already or hereafter to be made or built within the said township of Scarborough, may be properly flagged, paved, and cleansed, and that all annoyances, obstructions, nuisances, and incroachments therein may be removed, and the present and future drains, sinks, gutters, and watercourses for conveying the water and filth out of the said streets, lanes, public passages, and places, into the common sewers or drains, may be amended, repaired, cleansed, altered, and scoured, and new ones (if necessary) be made," enacts "that it shall and may be lawful for the said commissioners, when and so often as they shall think proper, to order or direct and cause all or any of the present and future pavements in the several streets, lanes, and other public passages and places within the said township of Scarborough (except the market-place and the streets where the markets and fairs are usually held), as well in those parts used by carriages as those used by foot-passengers, to be taken up, and the said streets, lanes, and other public passages and places to be flagged, paved, &c.,

1855.

In re
BIRCH.

1855.

In re
BIRCH.

as the said commissioners shall think proper." The 18th section impowers the commissioners to take in new streets, and make them public highways. The 19th section enables them to make sewers, &c., in, along, or across any of the streets, lanes, public passages, and places, and along or across any yards within the said township of Scarborough, and to charge the expense upon "the owners of such houses or buildings as now are or hereafter shall be built adjoining to and making use of such common sewer or sewers." The 20th section provides that the market-place and the streets where the markets and fairs are usually held, shall be paved and repaired by the bailiffs and burgesses, and their successors. Then follow provisions for the appointment of watchmen, and defining the districts within which they are to act, and for the regulation of hackney-coaches, chairmen, &c., and the prohibition of nuisances, &c. [*Maule, J.* Is there any provision for the regulation of the bathing-machines?] None: the act is silent as to them. The jurisdiction of the commissioners does not necessarily fail because there are certain powers to be exercised which are applicable only to some of the public places. *Blundell v. Catterall* does not in the smallest degree bear upon this case: there, the proprietor of an hotel on the shore at Great Crosby claimed, as against the lord of the manor, the right of traversing the sands between high and low-water mark; and three judges (against one) held that there was no such common law right. [*Cresswell, J.* Could the commissioners appoint watchmen to watch the shore between high and low-water mark?] No doubt they might. [*Jervis, C. J.* Where there is a fact disputed, the usual course is to direct the applicant to declare in prohibition. I see nothing, however, in the affidavits here to shew that the locus in quo is not a "public place" within the act.]

Atkinson, Serjt., in support of his rule. The locus in quo, if a "public place" at all, is not of the *kind* meant by the act of parliament. The provisions as to *paving*, *watching*, *lighting*, and *watering*, for instance, are not applicable to that portion of the sea shore which is covered by the flow of the tide. [*Maule*, J. Suppose a portion of it were inclosed and had streets formed upon it, it would then become within the act?] No doubt, it would. [*Jervis*, C. J. Do you contend that a place cannot be a "public place," that is not paved or watered?] No. The proper definition of a public place probably would be, a place where the public have a *right* to go. [*Jervis*, C. J. A "public place" within the act, seems to be a place where the public *in fact* go, where the protection provided by the act is required for the convenience of the public.] The affidavits, even if that *were* the meaning, do not shew that the South Sands is, in fact, a public place; only that several public streets terminate or abut thereon. [*Jervis*, C. J. It is sworn on the one side, and not denied on the other, that the South Sands between high and low-water mark are within the township of Scarborough. The act speaks of "public places:" and certainly public convenience requires us rather to lean in favour of holding it to be within the jurisdiction of the commissioners.] But, it must not only be a "public place," but one "made or built," or "laid out and made,"—of a particular kind. [*Jervis*, C. J. The statute, I think, could not intend that a place should not be a "public place" unless *artificially* constructed. *Maule*, J. Suppose the sands existed in their original state in the possession of a private individual, might they not be said to be *made* a "public place" by being dedicated to the public?] The word "made," construed by the maxim, "*Noscitur a sociis*," will not bear that construction. Again, it appears that the sands in question are the property of the lord of the manor, whose rights are expressly saved by the 91st

1855.

In re
BIRCH.

1855.

In re
BIRCH.

section of the act. [*Maule, J.* It seems that the commissioners have actually taken possession of the sands, by laying pipes therein: are we upon such a motion as this to disturb that possession?] It may be that the pipes were laid down with the consent of the lord. In *Loveridge v. Hodgson*, 2 B. & Ad. 602,—a case not unlike this,—it was held, that the 57 G. 3, c. xxix, did not give the commissioners authority to take under their jurisdiction, or to make a rate for lighting and watching, the foot-paths on the side of the turnpike-roads within the jurisdiction of the act. [*Maule, J.* It is somewhat remarkable that the act makes no mention of the sands. *Cresswell, J.* The 18th section (a) tends to shew that “place” was not meant to be confined to places having houses on either side.] The case of *Blundell v. Catterall* shews that the circumstance of the public in point of fact resorting to the sands does not make it a “public place” within the meaning of the act. Lastly, the learned Serjeant prayed to be allowed to declare in prohibition, to try the *fact* of the locus in quo being a public place.

(a) Which enacts, “that, when any new street shall be laid out and made in the said township of Scarborough (such streets being thoroughfares), and shall be well and sufficiently flagged and paved with good and substantial sea cobbles, and put in good order and repair, to the satisfaction of the said commissioners, then, on application of the owner or owners of the soil, or of the owner or owners of the adjoining houses of such streets, or a majority of them, it shall be lawful for the said commissioners, and they are impow-

ered, from time to time, by writing under their hands, to declare the same to be public highways; and, from and after such declaration made, such new streets and ways as aforesaid, and every of them, shall be deemed and taken to be public highways to all intents and purposes, and be repaired and kept in repair by the said commissioners as the other parts of the streets, lanes, alleys, and public passages, except as hereinbefore excepted, within the said township, are by this act directed to be managed and governed.”

JERVIS, C. J. I think, upon the materials which are before us, we are bound to discharge this rule. There is no affidavit that the place where Birch committed the alleged obstruction, was not *in fact* a public place. Birch's affidavit only states, that the South Sands were part of the manor of Scarborough, and were not "a street, lane, alley, or public place or public passage in the township of Scarborough, *within the meaning of the act of parliament*, and was not, as he was advised and believed, within the jurisdiction of the said commissioners." On the other hand, it is sworn that the commissioners have always exercised control over it, and assumed it to be within their jurisdiction; and their whole conduct with respect to it shews that they were acting under the bonâ fide belief that it was within their jurisdiction. To say the least, it is matter of very considerable doubt upon the construction of the act of parliament, whether they have jurisdiction or not. Now, a prohibition is not a matter of absolute right: the party asking for it is bound to make out a clear case. If he can shew that the commissioners have acted beyond their jurisdiction, the applicant has his remedy by action. Not being satisfied that he is entitled to have this rule made absolute, we can only discharge it.

1855.

 In re
BIRCH.

MAULE, J. I also think this rule should be discharged. The case is by no means free from difficulty upon the construction of the act. The commissioners, however, have, it seems, acted upon the assumption that they had jurisdiction over the South Sands as over any other street or public passage or place within the township; and nobody suggests that what they have done has ever been the subject of complaint. They have expended a large sum of money in the exercise of the powers of draining given to them by the act, in carrying tubes for that purpose under and through the sands in question, and which sum has been raised by means of

1855.

In re
BIRCH.

rates which nobody seems to have objected to. Under these circumstances, I do not think we are properly called upon to stop these proceedings by issuing a prohibition. The applicant may try the question of jurisdiction more rapidly, and probably more cheaply, by an action. For these reasons, I concur with my Lord in thinking that this rule should be discharged.

CRESSWELL, J. I am of the same opinion. We are not bound to grant a prohibition *ex debito justitiæ*, nor unless we are *clearly satisfied* that the inferior jurisdiction is about to exceed its powers. I admit that the construction of this act is by no means free from doubt. My Brother Atkinson says, amongst other things, that, though the public used the sands, they did not use them *of right*, and therefore they are not a "public place" within the meaning of the act of parliament. I think his construction on this point is not correct. The metropolitan police-act, 3 & 4 Vict. c. 84, authorises a police-constable to take into custody persons furiously riding or driving in any highway or public thoroughfare or place. Suppose the offence to be committed in Hyde Park, could it be said not to have been committed in a public place, because Hyde Park is not for *all* purposes a public place? The affidavit upon which this motion was founded, does not state that the place in question was not in fact a public place, but that it was not "a street, lane, alley, or public place, or public passage in the township of Scarborough, *within the meaning of the said act*," and was not, as the deponent was informed and believed, within the jurisdiction of the commissioners. And then it goes on to state something which is inconsistent with that, viz. that the deponent had, in common with many other inhabitants of Scarborough, always pursued his calling of a dealer in shells and pebbles on the said part of the said sands, until October in last year, without complaint or molest-

ation, and had always done so openly and without leave of any one, and *as of right*, as he believed. If they were there as of right, the applicant cannot consistently contend that it is not a public place. For these and the reasons given by my Lord and my Brother Maule, I concur with them in thinking that the remedy by action is the better course.

1855.

In re
BIRCH.

Rule discharged.

SIMPSON v. SADD.

Jan. 31.

THE writ of summons in this action was issued on the 6th of April, 1854. The declaration was delivered on the 8th of April, the plaintiff thereby seeking to recover 160*l.* 11*s.*, the price of certain fixtures sold and delivered by him to the defendant, and 54*l.* 19*s.* 11*d.* for the use and occupation of certain premises of the plaintiff. On the 19th of the same month, the defendant pleaded never indebted, and issue was joined on the 25th, and notice of trial given for the first sitting for London in Trinity Term last.

Practice as to allowing affidavits to be filed in answer to "new matter," under the 45th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

On the same 25th of April, the plaintiff filed a special claim in Chancery, praying a specific performance of an agreement whereby the defendant had agreed to take from the plaintiff a lease or leases of the messuages mentioned in the declaration in this action.

On the 22nd of May, the defendant obtained an order to add a plea of fraud.

On the 26th, the defendant, upon an *ex parte* application, obtained from Vice-Chancellor Stuart an order that the plaintiff should within eight days elect to proceed at law or in equity; whereupon the plaintiff, by the advice of counsel, elected to proceed in equity, and the record in the action at law was withdrawn by consent.

1855.

 SIMPSON
 v.
 SADD.

On the 27th of June, an order was made by Vice-Chancellor Stuart in the suit in favour of the plaintiff, and it was thereby, amongst other things, ordered that the defendant should pay to the plaintiff the costs of the action. The defendant appealed against this order, and, on the hearing of the appeal, the Lord Chancellor varied the order, by, amongst other things, directing that such part thereof as ordered the defendant to pay the plaintiff the costs of the action, should be omitted.

On the 2nd of January, 1855, the defendant applied to Maule, J., for an order to the master to tax his costs of the action, but failed to obtain it.

On the 19th of January, the defendant applied to the Lord Chancellor to vary the order so made by him on appeal, and by the order as finally settled it was ordered that the defendant had waived his right to require the plaintiff's title to the said messuages; and it was ordered that the defendant should within three weeks pay into the court of Chancery, amongst other sums of money, the sum of 27*l.* 0*s.* 6*d.*, the amount of the plaintiff's taxed costs of the said cause; and it was also ordered *that the defendant be at liberty to proceed at law, notwithstanding that order and the order of the 26th of May, 1854.* The total amount of the sums ordered to be paid into the court of Chancery under the order of the 19th of January, was, 347*l.* 12*s.* 5*d.*

Order of
Crowder, J.

On the 23rd of January, 1855, the defendant obtained from Crowder, J., an order "that the costs incurred by the defendant herein be referred to the master for taxation, and the amount found to be due be paid by the plaintiff to the defendant or his attorney, he the plaintiff having elected to proceed in equity for the same cause of action."

John Gray, on a former day in this term, obtained a rule calling upon the defendant to shew cause why the

order made by Crowder, J., should not be set aside, or that the costs taxed thereunder should be set off against the plaintiff's costs of the Chancery suit. He submitted, that, although the plaintiff might properly be put to his election whether he would proceed at law or in equity, the learned judge had no authority to order the plaintiff to pay the costs.

1855.

 SIMPSON
v.
SADD.

Petersdorff being now prepared to shew cause,

Gray,—upon a suggestion that the affidavit about to be used in opposition to his rule contained “new matter,”—moved, under the 45th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 (a), for leave to file affidavits in answer to such new matter. [*Cresswell*, J. What is the new matter?] The affidavit proposed to be used on shewing cause, in the statement of what took place on the hearing before the Lord Chancellor, alleges “that the defendant's counsel stated to the Lord Chancellor, that, unless the plaintiff was also restrained by his order from proceeding with his action, the moment the defendant attempted to recover his costs, he would meet with opposition from the plaintiff which would perhaps be the means of preventing the defendant from recovering his costs in this action, which the Lord Chancellor was clearly of opinion he the defendant was entitled to recover; and that, upon the defendant's counsel making such last-mentioned statement to the Lord Chancellor, Mr. Malins, who appeared as counsel on behalf of the defendant, at

(a) Which enacts, that, “upon motions founded upon affidavits, it shall be lawful for either party, with leave of the court or a judge, to make affidavits in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits.”

1855.

SIMPSON

v.

SADD.

once assured his Lordship that there would be no occasion for his client being restrained, as he, the plaintiff, would not attempt in any way to prevent the defendant from obtaining his costs of the action at law; whereupon the Lord Chancellor stated to the defendant's counsel, that, if, on proceeding to recover his costs, the defendant met with any opposition from the plaintiff or his solicitor, he was forthwith to make a further application to him, and he intimated that he would see that their opposition was stopped."

Petersdorff stating that he intended to rely upon that part of his affidavit,

JERVIS, C. J., said, that, as it was clearly new matter, the plaintiff must have an opportunity of answering it (a), and the rule was accordingly

Enlarged. (b)

(a) In a subsequent case of *Wood v. Cox*, in Trinity Term, 1855, a discussion took place as to the proper mode of carrying into effect the 45th section, and the court intimated an opinion that it must be by an exercise of their discretion upon the rule coming on for argument, and not (as was stated to be the practice adopted in the Queen's Bench) by a substantive motion.

(b) Cause was shewn in Easter Term, and the rule discharged. Vide post, Vol. XVI.

1855.

In the Matter of the Acknowledgment of ANN, the Wife
of JAMES TIERNEY.

Jan. 29.

AN acknowledgment of the execution of a deed by Mrs. Tierney was taken by special commissioners at Sydney, under the 3 & 4 W. 4, c. 74, s. 83. The registrar had declined to register it, on the ground of an erasure in the jurat, and the interlineation of the word "pecuniarily" in that part of the affidavit of verification which negated the interest of the commissioners.

The jurat of an affidavit of the due taking of an acknowledgment at Sydney, had an interlineation in the body of it, and an erasure in the jurat:—The court refused to allow it to be filed.

Milward now moved that the officer might be directed to receive and file it. He submitted that the erasure did not invalidate the affidavit,—citing *Jacob v. Hungate*, 3 Dowl. 456 (a); and that the interlineation was immaterial, inasmuch as it did not in any degree alter the sense of the affidavit.

They also refused to enlarge the time for returning the commission, in order to get the defects remedied,—the time for the return having expired.

JERVIS, C. J. The 140th rule of Hilary Term, 1853, is express. (b) The forms prescribed by the court ought to be adhered to: parties have no right to put their own construction upon them. It must go back.

Milward then prayed that the time for returning the commission might be enlarged.

(a) Where it was held, that the alteration of a figure in the date of an affidavit in the jurat, by writing one figure over another, does not constitute an erasure or interlineation within the meaning of the old rule.

(b) "No affidavit shall be read or made use of in any matter depending in court, in the jurat of which there shall be any interlineation or erasure."

1855.

In re
TIERNEY.

JERVIS, C. J. We cannot enlarge the time after it has expired and after the commission has been returned. You must obtain a fresh one.

The rest of the court concurring,

Rule refused. (a)

(a) See *In re Fagan*, antè, Vol. V, p. 436, and *In re Mary Ann Worthington*, antè, Vol. V, p. 511, where interlineations in the jurat and in the body of the affidavit, respectively, were held fatal.

In the Matter of the Acknowledgment of MARIANNE,
the Wife of FREDERIC CLERICETTI.

Jan. 29.

Where an acknowledgment of a married woman, under the 3 & 4 W. 4, c. 74, was taken at Milan, the court allowed a certified copy of an act of The Imperial Royal Civil Tribunal of that city to be received and filed in lieu of the affidavit verifying the certificate of the commissioners,—upon the production of an affidavit from a competent party, shewing, that, by the law of that country, depositions on oath are always deposited amongst the records of the court, and office or certified copies only delivered out to the parties.

BARSTOW, on a former day in this term, moved for an order that the registrar under the 3 & 4 W. 4, c. 74, might receive and file the certificate of the acknowledgment of a deed by Marianne, the wife of Frederic Clericetti, taken at Milan. In lieu of the ordinary affidavit of verification, there was annexed to the certificate an act of court in the Italian language, accompanied by a translation duly certified by a notary, of which the following is a copy:—

“ In the Imperial Royal Civil Tribunal of the city of Milan, 15 September, 1854. With the intervention of Giacomo Maggioni, assistant judge, Luigi Riva, clerk.

“ Appeared spontaneously the notary Dr. Giulio Caimi, residing here, who presented for the hereinafter mentioned declarations Henry Malone, gentleman, domiciled here, at No. 2553, Santa Maria Folcorina, and

Marianne Baker, wife of Frederic Clericetti, of the Contrada San Maurilio, No. 3418, in Milan.

1855.

In re
CLERICETTI.

"Mr. Malone requested that his following deposition should be received:—

"'Being duly appointed by the court of Common Pleas in London, jointly with Mr. Philip Box, to interrogate the above-mentioned Mrs. Marianne, by marriage Clericetti, whether it were really her intention to sell her estates in England, I have executed that commission, and delivered the analogous certificate thereof under date the 14th instant, which certificate I here present in the English language, signed by the above-mentioned Box and by myself.'

"In effect, he exhibited a parchment written in the English language, having the aforesaid date, and bearing the signatures Philip Box and Henry Malone, which having been seen was returned to him. He afterwards added,—

"With reference to the said certificate, and under the obligation of my own oath, I attest and certify that I personally know Mrs. Marianne Clericetti, here present, wife of Frederic Clericetti, and that the declaration relating to her set forth in the certificate by me delivered, was by her really made to me: that the said certificate was signed by me, and by the other commissioner Philip Box, who has possessions in Milan, on the day and year set forth by the same, in the statement of both: that the said Mrs. Marianne Clericetti, at the time she made such declaration, was of full age and sound mind, and that she knew such declaration was made for the purpose of passing her interest in the estate to which the said declaration refers: that I am not in any manner interested in this business; nor have I taken part therein as advocate, attorney, or agent, clerk, or otherwise: that, previous to receiving the declaration, I inquired of the said Mrs. Marianne Cleri-

1855.
 In re
 CLERICETTI.

cetti whether it was her intention to give up her interest in the said estate, without taking any provision in consideration thereof, to which she replied that she wished to give up voluntarily the said interest, without having any provision in lieu thereof; and I further add that I have no reason to doubt the truth, and that I really believe every thing true of what is stated in the said certificate, and that the estate of the said Mrs. Marianne Clericetti which is mentioned in the certificate, is situate in the parish of Cannington, in the county of Somerset.

"He added that he makes this deposition in order to comply with the prescription of the English law for making valid the sale above mentioned.

"Mrs. Marianne Clericetti, appearer as above, repeated here, being present, that she voluntarily gave up her interest which is described in the aforesaid certificate, without wishing for any provision in lieu thereof.

"The notary, Dr. Caimi, demanded an authentic copy of the present minute, in order to make use thereof in concert with the other appearers in the successive acts of the said date.

"Read, confirmed, and subscribed.

Subscribed	{	" Henry Malone.
		" Maria Anna Clericetti.
		" Dr. Giulio Caimi, Notary.
		" Giacomo Maggioni.
		" Luigi Riva.

"The foregoing copy agrees with the original existing in these archives under No. 40653.

"Drawn up on a stamp for 75 centimes.

"Milan, from the Imperial Civil Tribunal
 of this city, 16 September, 1854.

"The Imperial Royal Counsellor and Director,
 " Rognoni
 " Crespi, Registrar."

CRESSWELL, J. Can we dispense with the original affidavit, and receive a certified copy,—which this purports to be,—without some substantial reason being assigned for the non-production of the original?

1855.

In re
CLERICETTI.

Barstow. The court has upon occasions admitted affidavits not strictly complying with its rules. Thus, in a case of *In re Birch and Bell*, 6 Scott, 185, 4 N. C. 394, an affidavit sworn at Hamburgh was received, though not *signed* by the deponent,—it being sworn, that, by the practice of that place, the affidavit is never signed by the deponent.

JERVIS, C. J. You must produce an affidavit, as was done in that case, shewing that the document you produce is the only evidence which the law of the country enables you to produce, in order to authenticate the oath of the commissioner. “We must,” as Tindal, C. J., observes, “be satisfied that the oath has been administered according to the proper form of the place where it is taken.”

Barstow now produced the following affidavit,—
“Adolphus Bach, of &c., foreign juristconsult, maketh oath and saith that he, this deponent, is German counsel to the Austrian legation at the court of St. James’s, London, and that he is well acquainted with the laws of Austria, as administered in the judicial courts of the kingdom of Lombardy, in the empire of Austria: And this deponent further saith that depositions on oath made and signed by deponents before the judges of such courts respectively, are never delivered or given to the deponents or to any other person or persons whomsoever, but that the same by an inflexible rule are always deposited amongst the records of the said courts respectively, and office-copies thereof are delivered to the de-

1855.

In re
CLERICETTI.

ponents or parties requiring the same, which office-copies are signed by the judge for the time being of such courts respectively, and are similar in form to the document or paper in writing in the Italian language produced and shewn to this deponent at the time of swearing this his affidavit, and marked &c. : And this deponent further saith, that, by virtue of a resolution of the Supreme Court of the Austrian empire, bearing date the 7th of October, 1793, and of an order of the Supreme Council of the empire, bearing date the 6th of April, 1797, every such office-copy has the same validity and effect as the original so deposited amongst the records of the said courts would have in case the same were produced : And this deponent further saith that the aforesaid judicial courts are the only courts in the kingdom of Lombardy which are qualified to administer oaths."

Per Curiam. The documents may be received.

Fiat.

1855.

In the Matter of the Acknowledgment of ELIZA BARBARA WARNE, the Wife of PETER WARNE (now ELIZA BARBARA GARDNER, the Wife of WILLIAM HENRY GARDNER).

Jan. 24.

CERTAIN freehold premises in Bristol, the separate property of Mrs. Warne, were conveyed by her by an indenture bearing date the 21st of July, 1842, which indenture was duly acknowledged by Mrs. Warne, before two commissioners, pursuant to the 3 & 4 W. 4, c. 74, and such acknowledgment duly certified by them, on the 29th of the same month; but by some inadvertence or oversight on the part of the attorney concerned in the transaction, the certificate was not filed at the time, nor was any affidavit made verifying the same.

An acknowledgment of a deed by a married woman, under the 3 & 4 W. 4, c. 74, was taken in the year 1842, and the certificate and memorandum thereof duly signed by the commissioners; but, by some inadvertence on the part of the solicitor employed in the transaction, there was no affidavit of verification, and the documents were not filed:—

Lush, on a former day in this term, moved that the certificate and affidavit might now be received and filed. The motion was founded upon (amongst others) an affidavit of George Edward Taylor, the solicitor who acted on the occasion, who deposed, that, on the 29th of July, 1842, the said Eliza Barbara Warne attended at the office of William Tanner the younger, at Bristol, for the purpose of executing the said deed, and acknowledging the same pursuant to the statute, before John Bush (since deceased) and the said William Tanner the younger, who were then two of the perpetual commissioners for taking the acknowledgments of deeds by married women; and the said Eliza Barbara

After the lapse of thirteen years, the court allowed the certificate to be received and filed, upon an affidavit by the surviving commissioner, stating that it had always been his practice, and, as he believed, that

of his co-commissioner, to make all requisite inquiries of the married woman before taking her acknowledgment, and that, from the circumstance of his having signed the certificate and memorandum, he verily believed that all proper inquiries had been made on this occasion, though, from the lapse of time, he was unable positively to state what the answers were.

1855.

In re
WARNE.

Warne then duly executed the said indenture, and her execution thereof was attested by the said John Bush and William Tanner the younger, and she was then examined by the said commissioners separate and apart from her then husband, and they the said commissioners duly signed the usual memorandum indorsed on the said indenture, and they also signed and delivered to the deponent the certificate of such examination, and of the acknowledgment of the said deed by the said Eliza Barbara Warne, and which said memorandum and certificate were respectively dated on the said 29th of July, 1842: that Mrs. Taylor, the party beneficially entitled under the conveyance, on the completion of the purchase, took possession of the deeds with the aforesaid certificate of acknowledgment by the said Eliza Barbara Warne, and locked them up and retained them in her own possession to the time of her decease, which happened on the 25th of August, 1850, and *the said certificate was thus omitted to be inrolled, and the necessity of such inrolment was overlooked and forgotten*, and the omission was not discovered until after the deponent,—to whom the premises were demised or appointed by the will or testamentary appointment of his said wife, upon trusts for sale for payment of debts,—had entered into an agreement for the sale of the said premises: that Warne is dead, and his wife married again to one William Henry Gardner, and that, after the discovery by the deponent that the said certificate had not been inrolled, he caused application to be made to her to confirm the aforesaid conveyance by a new deed to be executed by her and her present husband, and to be acknowledged by her pursuant to the said act; that such deed was accordingly prepared, and executed by Mr. and Mrs. Gardner, and the latter was examined by William Tanner and Edward Burges, two commissioners, when *she declined to declare that*

she freely and voluntarily consented to the said deed, so that the proceeding was rendered abortive. Mr. William Tanner, the surviving commissioner before whom the acknowledgment was taken, also made an affidavit stating that he took the acknowledgment, but that, owing to the lapse of time, he was unable to swear that the necessary questions were put to the lady; though his invariable practice in such cases, and, as he believed, the practice of his co-commissioner, was, never to sign a certificate until all the necessary inquiries had been made and duly answered. [Jervis, C. J. The commissioner is merely swearing to his practice. He is calling upon us to infer from the facts which he states, that he did all that the statute and the rules of court required him to do. Why does he not swear, that, from the memorandum made at the time, and from his ordinary practice in such cases, he believes he did all that was requisite?] The rules themselves recognise that there may be variations in the affidavits, according to circumstances: and, if the court see reason to believe that the directions in the statute and in the rules have been substantially complied with, they cannot require more. [Maule, J. If this affidavit had been made at the time, it clearly would not have been sufficient.] In that case, there would have been no reason why the affidavit should not state positively what the answers of the party were. Here, the lady makes no objection.

1855.

 In re
WARNE.

JERVIS, C. J. I think we should require the commissioner at least to state the conclusion which he himself draws.

MAULE, J. I cannot help thinking he intended to do so here. *Omnia præsumuntur legitimè facta, donec probetur in contrarium.* However, there will be no difficulty in getting an amended affidavit, and the matter may be mentioned again.

1855.

In re
WARNE.*Lush* now produced the following affidavit :—

“Thomas Pymm Attwood, of the city of Bristol, inspector of police, and William Tanner, of the city of Bristol, gentleman, late William Tanner the younger, one of the attorneys of the court of Queen’s Bench, and one of the commissioners named in the certificate hereunto annexed, severally make oath and say,—and first this deponent T. P. Attwood for himself saith, that he knows Eliza Barbara Gardner, late Eliza Barbara Warne, in the said certificate mentioned, now the wife of William Henry Gardner, but at the time of making the acknowledgment in the said certificate mentioned the wife of Peter Warne (since deceased), in the said certificate also mentioned ; and that, at the time of making such acknowledgment, the said Eliza Barbara Gardner was of full age : And the said William Tanner for himself saith, that the acknowledgment in the said certificate mentioned was made by the said Eliza Barbara Gardner, and the certificate signed by this deponent, and John Bush, then of the said city of Bristol, gentleman, but since deceased, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at the city of Bristol aforesaid, in the presence of this deponent ; and that, at the time of making such acknowledgment, the said Eliza Barbara Gardner was of competent understanding, and that the said Eliza Barbara Gardner knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said William Tanner for himself further saith that he this deponent, one of the said commissioners, was not at the time of taking the said acknowledgment, and is not now, and hath not at any time been, interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney,

solicitor, or agent so interested or concerned: And this deponent the said William Tanner for himself further saith that he has been, and acted as, commissioner for taking the acknowledgments of married women ever since the month of May, 1834, and that his rule and practice have invariably been, and as he verily believes the rule and practice of the said John Bush always were, to examine separate and apart from her husband every married woman who appeared before him to make an acknowledgment of any deed, and to make all the inquiries required by law of the said married woman making the acknowledgment, and receive the answers, before signing the certificate, and never to sign such certificate, and this deponent believes he never did sign any certificate, until he, or his co-commissioner in his presence, had made such inquiries and received such answers as satisfied this deponent that such married woman freely and voluntarily consented to the said deed, and intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her, or, if a provision was to be made for her, that such provision had been made by deed or writing, or that the terms thereof had been reduced into writing, nor, in such last-mentioned case, until such deed or writing had been produced to this deponent and his co-commissioner: And this deponent further saith, that he has no recollection of the answer given by the said Eliza Barbara Gardner on the occasion of her making the said acknowledgment hereto annexed; but this deponent believes, and has no doubt, having regard to his invariable practice, and to the fact that the said certificate was signed by him and the said John Bush on the day of the date thereof, that, previous to the said Eliza Barbara Gardner making the said acknowledgment, he this deponent, *or the said John Bush*, inquired of the

1855.

In re
WARNE.

1855.

In re
WARNER.

said Eliza Barbara Gardner whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates, and that the said Eliza Barbara Gardner declared either that she did intend to give up her interest in the said estates without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest, or that a provision was to be made for her in consequence of her giving up such her interest in the said estates; and, if the said Eliza Barbara Gardner so declared as last aforesaid, this deponent has no doubt that he this deponent and the said John Bush were satisfied that such provision had been made by deed or writing, or that the terms thereof had been reduced into writing, and that such deed or writing had been produced to the said commissioners: And the said William Tanner for himself further saith, that it appeared by the deed acknowledged by the said Eliza Barbara Gardner, that the premises wherein she is stated to be interested are described to be in the parishes of Temple, otherwise Holy Cross, and St. Michael, both in the said city of Bristol: And this deponent the said William Tanner for himself further saith, that he hath been informed that no affidavit in regard to the acknowledgment mentioned in the said certificate hereunto annexed has been made, except the affidavit of this deponent and the said Thomas Pymm Attwood sworn by this deponent on the 12th of December last, and that the said certificate has never been filed, but this deponent is not aware of any reason why such affidavit was not made at the time, or why such certificate was not filed, except that he has been informed that the necessity for the same was overlooked and forgotten by the solicitor acting on the occasion:

And this deponent the said William Tanner further saith, that, on the 9th of March last, at the request of Messrs. C. G. Heaven and J. G. Heaven, of the city of Bristol aforesaid, solicitors, he attended in conjunction with Edward Bruges, of the city of Bristol, gentleman, one other of the perpetual commissioners appointed for the said city of Bristol and county of the same city, for taking the acknowledgments of deeds by married women pursuant to the 3 & 4 W. 4, c. 74, intituled, &c., at the offices of the said Messrs. Heaven, in John Street, in the city of Bristol, and then and there the said Eliza Barbara Gardner, then the wife of the said William Henry Gardner, appeared personally before this deponent and the said Edward Bruges, and produced a certain indenture or deed purporting to be a deed of confirmation by her the said Eliza Barbara Gardner of the said deed so as aforesaid acknowledged by her; and that the said Eliza Barbara Gardner was examined by this deponent and the said Edward Bruges apart from her husband touching her knowledge of the contents of the said deed then produced, and her consent thereto; and, it then appearing to the said Edward Bruges and this deponent that she did not freely and voluntarily consent to the same, this deponent and the said Edward Bruges thereupon determined it would be better to adjourn the taking of such acknowledgment, in order to give to the said Eliza Barbara Gardner time to think further over the subject, and to get further advice if she thought fit; and the taking of such acknowledgment was adjourned by this deponent and the said Edward Bruges accordingly; and this deponent hath not since been summoned to take the acknowledgment of the said Eliza Barbara Gardner to the said deed, or any other deed: And this deponent saith he hath been called upon by the said Messrs. Heaven to make the usual affidavit respecting the said acknowledgment mentioned in the said certifi-

1855.

In re
WARNE.

1855.

In re
WARNE.

cate hereunto annexed (so far as such certificate and his recollection of the facts and circumstances of the case at this distant period of time enable him), whereon to ground an application to this court to file the said certificate."

Per Curiam. We think the affidavit is now sufficient. The certificate and affidavits therefore may be filed.

Fiat.

HERNAMANN and Another, Assignees of JAMES BURGESS,
a Bankrupt, v. BARBER.

Jan. 31.

In an action by assignees of a bankrupt, the defendant gave notice to dispute the *trading and act of bankruptcy*.

At the trial, the judge nonsuited the plaintiffs on the ground that the petitioning-creditor's debt upon the proceedings was contracted at a period when the bankrupt had ceased to be a trader. The court set aside the nonsuit, holding that the objection was not open to the defendant under the notice to dispute the *trading and*

THIS was an action by the plaintiffs, as assignees of one James Burgess, a bankrupt. The declaration contained two counts in trover, and two counts for money had and received,—in right of the bankrupt before his bankruptcy, and of his assignees since.

The defendant pleaded to the counts in trover, and as to the money counts paid into court 42*l.*, which the plaintiffs took out in satisfaction of the claim in respect of those counts.

The defendant delivered with his pleas a notice, pursuant to the statute 12 & 13 Vict. c. 106, s. 234, of his intention to dispute the *trading and act of bankruptcy*. (a)

At the trial before Platt, B., at the Liverpool Spring Assizes, 1854, upon proof that the petitioning-creditor's debt upon the proceedings was contracted at a period when the bankrupt had ceased to be a trader, the

(a) There is an inaccuracy in this respect in the report of this case, *antè*, Vol. XIV, p. 583.

act of bankruptcy. A judge at chambers having allowed the defendant to amend his notice, by adding thereto that he intended at the trial to dispute the petitioning-creditor's debt,—The court refused to allow the plaintiffs to discontinue *without payment of costs*.

learned baron nonsuited the plaintiff. The court, however, afterwards set aside the nonsuit, and granted a new trial, on the ground that the notice to dispute *the trading and act of bankruptcy* only, did not enable the defendant to controvert *the petitioning-creditor's debt*.

A summons was afterwards taken out on behalf of the defendant, calling upon the plaintiff to shew cause why the defendant should not be at liberty to amend his notice by adding thereto that he intended at the trial to dispute the petitioning-creditor's debt, and why he should not be at liberty to withdraw his pleas, and plead de novo. The summons came on to be heard before Lord Campbell, who, after hearing counsel on both sides, made an order in the terms of the summons, upon payment of three guineas costs.

Atherton, on a former day in this term, moved to rescind Lord Campbell's order. A sufficient debt was proved at the trial, which might, under the 133rd section of the 12 & 13 Vict. c. 106, have been substituted for the debt upon which the adjudication proceeded. The amendment, however, renders it impossible for the plaintiffs to proceed to a new trial with any hope of success. The loss of the verdict on the former occasion having occurred through the miscarriage of the judge, the plaintiffs ought to have the costs of the former trial; or, at all events, they ought not to be in a worse position than they would have been in had the defendant given a good notice to dispute in the first instance,—in which case they would have been spared their own costs of the trial, which are now thrown away.

JERVIS, C. J. I do not see how you can visit the defendant with the consequences of the misdirection of the learned judge. The utmost you can be entitled to,

1855.

 HERNAMANN
v.
BARBER.

1855. I think, is, a rule to discontinue upon the usual terms,
HERNAMANN viz. upon payment of costs.
v.
BARBER.

After some discussion, the court granted a rule nisi to discontinue *without costs*, against which

Hugh Hill now shewed cause. The court, in their discretion, may allow a plaintiff to discontinue without costs, where, by reason of the insolvency of the defendant, the action would be fruitless. So, where the plaintiff has been misled by the defendant. But neither of these grounds exists here. In *Poensgen v. Chanter*, 6 Scott, 300, where the plaintiff had joined in the action one who was no party to the contract, the court refused to allow him to discontinue without paying costs, it not appearing that the plaintiff was induced by the other defendant's conduct to believe that the contract was entered into with the two, or that the mistake arose from any other cause than the plaintiff's own negligence. And the rule is thus stated by Tindal, C. J.,—"The plaintiff has a right to discontinue, but at the peril of costs, which the court are in their discretion empowered by the 8 Eliz. c. 2, to award to the defendant. A plaintiff is never allowed to discontinue without paying costs, unless it be made clearly to appear that the step is rendered necessary by the misconduct of the defendant." What has the defendant in this case done to deprive him of his right to costs? The only ground urged for granting this rule, is, that the plaintiffs feel that they cannot safely proceed to a new trial. That surely is no ground for a departure from the established rule, or for depriving the defendant of his costs up to the time he is by the practice of the court entitled to them.

Atherton, in support of his rule. The defendant's

right to costs on a discontinuance is entirely in the discretion of the court; and there is no reason for the exercise of that discretion in his favour in the present case. In *Poensgen v. Chanter* no fault could be imputed to the defendant. [*Jervis*, C. J. What fault can be imputed to the defendant here? He gave notice to dispute the trading and act of bankruptcy: the learned judge at the trial took the objection that the petitioning-creditor's debt upon the proceedings was contracted at a period when the bankrupt had ceased to be a trader; and, the defendant's counsel adopting it, the plaintiff was nonsuited,—improperly, as we thought. But there was no fault, no culpable conduct on the part of the defendant.] The plaintiffs were misled by the defendant's insufficient notice to dispute.

1855.

HERNAMANN
v.
BARBER.

JERVIS, C. J. If the defendant had given a correct notice to dispute the petitioning-creditor's debt, as well as the trading and act of bankruptcy, in the first instance, the plaintiffs must have discontinued at once. They will have no more costs to pay now than they would have had then. I see no reason why the costs should not be paid.

MAULE, J. I have heard nothing to satisfy me that this case ought to be made an exception to the general rule.

Hill asked for the costs of the rule.

JERVIS, C. J. If my suggestion when the rule was moved had been adopted, the defendant would not have shewn cause; I think the rule should be made absolute to discontinue on payment of costs, the plaintiffs paying the costs of the rule.

The rest of the court concurring,

Rule accordingly.

1855.

MILNE and Others v. MARWOOD and Another.

Jan. 31.

Upon a negotiation for the sale of a ship, B., the seller, represented to A., the buyer, that she was, so far as he knew, as sound as a ship of her age usually was. Upon the faith of this representation, A. agreed to purchase the ship, and proceeded to make alterations in her to fit her for a voyage to Australia, for which A. at the time of the contract knew she was intended. The register proving defective, A. afterwards repudiated the bargain, and, upon a suggestion that the representation of B. as to the ship's soundness was false, brought an action against

THIS was an action for an alleged false representation by the defendants upon the sale of a ship.

The declaration stated, in substance, that the defendants were the owners of a ship called the Dowthorpe, which they had contracted to sell to the plaintiffs; that, in order and with intent to induce the plaintiffs to expend moneys in and about repairing the said ship, the defendants falsely and fraudulently represented to the plaintiffs that she was sound, for anything they the defendants knew to the contrary; and that the plaintiffs were, as the defendants intended that they should be, induced by the said false and fraudulent representation to expend moneys about repairing the ship, which but for the said false and fraudulent misrepresentation they would not have done; whereas, in truth, the said ship, at the time of the said representation of the defendants, was unsound and rotten, to their knowledge, and not worth the said expenditure; and, by reason of the premises, the plaintiffs lost the said moneys, &c. &c.

Pleas (amongst others),—first, not guilty,—secondly, that the plaintiffs were not, nor did the defendants or either of them intend that they should be, induced by the false or fraudulent representations of the defendants,

him, charging him with a false and fraudulent representation with a view to induce A., and whereby A. was induced, to expend moneys on the ship, which but for such false and fraudulent representation he would not have done.

At the trial, the judge told the jury, that, to sustain the action, the plaintiff must prove,—that the defendant made the representation alleged,—that it was false,—that the defendant knew it to be false,—and that damage had resulted to the plaintiff. The jury returned the following verdict,—“We find for the plaintiff, but acquit the defendant of any fraudulent intention:”—Held, that, upon this finding, the verdict was properly entered for the plaintiff.

Quære, whether the plaintiff could recover as damages the amount expended by him in repairing the ship?

to expend the said money, or any part thereof, as in the declaration alleged. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were in substance as follows:—The Dowthorpe was built in 1836, and classed A. 1. at Lloyd's. In 1849, being in the dock of a ship-builder named Turnbull, at Whitby, and the owners being anxious to have her continued in the first class, it became necessary to have her surveyed by Lloyd's surveyor. Accordingly, she was surveyed by one Brunton, who pronounced her to be rotten. The owners, believing Brunton to be influenced by improper motives, declined to have the vessel classed at all, and had her repaired at Turnbull's at an expense of 219*l.*,—the only decay then found to exist being removed by enlarging the trenail-holes. The Dowthorpe was afterwards employed in the timber trade, and between the years 1849 and 1853 went several voyages to Quebec and other ports in the St. Lawrence, and also to Gottenburgh. In January, 1853, the defendants agreed to sell the ship to the plaintiffs; upon which occasion one of the defendants said that the ship was as sound as a vessel of her age usually is, and that, "as far as he knew, her timbers were sound." The ship was at this time in dock, and the plaintiffs, who had (as the defendants knew) purchased her for the Australian trade, proceeded to repair her; but shortly afterwards declined to complete the purchase, on the ground of some defect in the register. The vessel was then surveyed again, with a view to her being re-classed, and accordingly she was classed a black diphthong; but ultimately, in July, 1853, *seven decayed timbers having been renewed, at a cost of 38*l.**, she was restored to class A. 1. There was conflicting testimony as to the condition of the vessel when surveyed by Brunton in 1849.

1855.

MILNE
v.
MARWOOD.

1855.

 MILNE
 v.
 MARWOOD.

In his summing up, the Lord Chief Justice told the jury, that, in order to maintain the action, it was necessary for the plaintiffs to prove,—first, that the defendants represented the ship to be sound,—secondly, that that representation was false,—thirdly, that the defendants, at the time of making it, knew it to be false: and he particularly called the attention of the jury to the intention imputed to the defendants by the declaration.

The jury returned the following verdict, in writing:—
 “We find a verdict for the plaintiffs (damages 400*l.*), but acquit the defendants of any fraudulent intention.”

Upon this finding, a verdict was entered for the plaintiffs.

Shee, Serjt., in Michaelmas Term, obtained a rule nisi to enter a verdict for the defendants on the first, second, and third issues, on the ground that the jury had negatived fraudulent intention by the defendants; and also on the fourth and fifth issues, on the ground that it was so intended by the counsel on both sides with the sanction and direction of the Lord Chief Justice; or for a new trial on the ground of misdirection on the part of the judge in not directing the verdict to be entered for the defendants as aforesaid, and also that the verdict was against evidence.

Byles, Serjt., and *Willes*, shewed cause. There is no misdirection: neither is there any inconsistency in the finding: and the verdict was fully warranted by the evidence. The finding establishes that the whole of the elements mentioned in the summing up as essential to the maintenance of the action concurred. The language adopted by the jury was evidently used for the purpose of shewing, that, though they thought the defendants blameable, they did not wish to cast a reflection upon their moral character. This case somewhat resembles *Polhill*

v. *Walter*, 3 B. & Ad. 114. There, a bill was presented for acceptance at the office of the drawee, when he was absent: A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on it an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter: the bill was dishonoured when due, and the indorsee brought an action against the drawee, and, on proof of the above facts, was nonsuited. The indorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorised to accept by procuration; and, on the trial, the jury negatived all fraud in fact: it was held, notwithstanding, that A. was liable, because the making of a representation which a party knows to be untrue, and which is *intended*, or is calculated, from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is *a fraud in law*, and A. must be considered as having intended to make such representation to all who received the bill in the course of its circulation. And Lord Tenterden said,—“If the defendant, when he wrote the acceptance, and thereby in substance represented that he had authority from the drawee to make it, knew that he had no such authority (and, upon the evidence, there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.” [*Maule*, J. If the defendants, having no knowledge at all upon the subject, represented the ship to be sound, when in fact she was rotten, and damage resulted to the plaintiffs, an action would lie. But it was perfectly immaterial to the defendants whether the plaintiffs laid out money upon the ship or not. Having elected to treat the sale as a void sale, can they charge the defendants with the out-

1855.

MILNE
v.
MARWOOD.

1855.

MILNE
v.
MARWOOD.

lay?'] The defendants knew at the time of the sale that the plaintiffs wanted the ship for the Australian trade, and that she would necessarily require repairs to an extent and of a nature which would not be useful for any other voyage. The natural consequence, therefore, of the defendants' misrepresentation, was, that the plaintiffs unnecessarily expended a large sum. Surely that cannot be said to be too remote a consequence. [*Williams, J.* It is laid here with intention, for the express purpose of shutting out the objection of remoteness. *Maule, J.* What evidence was there of intention on the part of the defendants to induce the plaintiffs to lay out money?'] The money was expended upon the vessel whilst she was the property of the defendants; and the defendants, at the time they made the representation which the jury have found to have been false, and false to their knowledge, knew that the plaintiffs upon the faith of that representation were going to expend money in the repairs. If a man take upon himself to give another a piece of information which he was not bound to give, he is not responsible merely because it turns out to be untrue: but, if he knows it to be false, and knows that the other is about to act upon the faith of its being true, and damage results, he clearly is liable for the direct consequences of his wrong. The question is, whether the jury have by their finding negatived any of the facts necessary to constitute what in law is an actionable fraud. The representation was, that the ship was sound, for anything the defendants knew to the contrary. The jury find that the defendants made that representation, knowing it to be untrue. The other elements of fraud are not negatived by that finding. The superimposition of the term "fraudulent" shews that the jury intended something more than the summing up had suggested. It is enough, however, to say that all the elements stated in the direction of the Lord Chief Justice to the

jury as essential to constitute fraud, have been found by the jury to exist, notwithstanding what they have thought fit to tack on to the end of it.

1855.

MILNE
v.
MARWOOD.

Shee, Serjt., and *Hugh Hill*, in support of the rule. The finding is ambiguous: but, looking at it with reference to the facts proved at the trial, and relied on for the plaintiffs, it entirely removes them from their ground of action. Either the finding amounts to a verdict for the defendants, or it is a verdict against evidence.

MAULE, J. I think it is quite clear that the jury meant to find a verdict for the plaintiffs; but they thought fit to add something to make it go down easily with the defendants. Being persons moving in a respectable position, the jury probably felt that a verdict against them without more, would cast upon them an unmerited reproach, and therefore they add that they acquit the defendants of any fraudulent intention. I think it is impossible to make anything of that part of the rule. As to the rest, it would be more satisfactory that the matter should be submitted to another jury, the costs to abide the event.

The rest of the court concurring,

Rule absolute accordingly.

1855.

BENGE v. MARY SWAINE, Administratrix of THOMAS PAGE, Deceased.

Jan. 31.

Where an administratrix has been made defendant in an action commenced against the intestate, by a suggestion under the 138th section of the Common Law Procedure Act, 1852, and has pleaded to the suggestion,—The court will not allow the plaintiff to discontinue without payment of *all the costs of the cause*.

The plaintiff having obtained a judge's order to discontinue "on payment of costs," and having acted upon the order, by attending the taxation under it,—The court refused to allow him to abandon it.

AN action had been brought by Benge against Page, the declaration in which stated that the plaintiff was and still is possessed of two cottages or messuages, with the appurtenances, situate in the county of Sussex, and by reason thereof was and still is entitled to have a certain way from the said cottages unto and into a certain street called Winding Street, there, and so thence back again from the said street unto and into the said cottages, for himself and his servants on foot to go, return, pass, and re-pass at all times at his and their own free will and pleasure, for the convenient and proper occupation of the said cottages: that the defendant, by building and erecting in and upon the said way a wall of a certain dwelling-house there, greatly obstructed, straitened, and narrowed the said way, and the access and approach to the said cottages were thereby greatly interfered with and disturbed: that the defendant also by building and erecting a certain water-closet over and across the said way, greatly obstructed, narrowed, and darkened the same, and, by making and opening a doorway to and from the said house upon and over the said way, also greatly obstructed, narrowed, and darkened the said way: that the defendant, by making and opening a certain window in the said wall of the said last-mentioned dwelling-house, greatly interfered with the plaintiff's privacy and peaceable use and occupation of the said cottages: that the defendant also, by building and constructing a certain coal-cellar for the use of the said last-mentioned dwelling-house, in and under the ground of the said way, stopped and choked up the

sewers or drains of and belonging to the said cottages, and which the plaintiff was and is entitled to have there, and which were and are necessary for the use and occupation of the same, and thereby prevented the same being drained: and that the defendant, by building and constructing the said last-mentioned coal-celler, thereby also prevented the plaintiff from making the last-mentioned drains or sewers to communicate with and run into the main sewer in the said street, for the purpose of draining the said cottages.

To that declaration, the defendant pleaded several pleas, upon which issue was joined on the 3rd of March, 1853.

Notice of trial was given for the Sussex Spring Assizes in that year. On the 13th of March, which was the day before the commission day, the defendant Page died. On the 30th of September, Mary Swaine took out administration, and, on the 10th of February, 1854, the plaintiff made a suggestion in the copy of the issue, in the following terms:—"And hereupon, that is to say, on the 10th day of February, 1854, the plaintiff suggests and gives the court here to understand and be informed that the said Thomas Page departed this life on the 30th day of March, 1853, and that Mary Swaine is administratrix of all and singular the goods and chattels which were of the said Thomas Page at the time of his death, who died intestate."

Copies of the above suggestion, and of the writ in this action were served upon Mary Swaine by the plaintiff on the 15th of April, 1854, together with a notice signed by the plaintiff's attorney in the cause, requiring her to appear within eight days after service thereof, inclusive of the day of such service. On the 21st of April, 1854, Mary Swaine, as such administratrix, in pursuance of such notice, duly entered an appearance, and on the 27th obtained an order to plead several

1855.

 BERGE
v.
SWAINE.

Death of Page.

Suggestion.

1855.

BENGE

v.

SWAINE.

Pleas to the
suggestion.

matters to the suggestion, and on the same day delivered the following pleas:—

“1. And the said defendant Mary Swaine, by S. F. L., her attorney, saith that the supposed wrongs in the said declaration mentioned were not, nor were any, nor was either of them, or any part thereof, committed by the said Thomas Page at any time within six calendar months next before the death of the said Thomas Page:

“2. And for a second plea, the said Mary Swaine saith that she was not at any time within six calendar months next after she took upon herself the administration of the estate and effects of the said Thomas Page, deceased, served with a copy of the said writ or suggestion, or with a notice signed by the plaintiff or his attorney requiring her the said Mary Swaine to appear within eight days after service of the said notice, inclusive of the day of such service.”

On the 8th of May, 1854, a summons was taken out, calling upon Mary Swaine, as such administratrix, to shew cause why the plaintiff should not be at liberty to discontinue on payment of the costs of the pleas to the suggestion; and thereupon Maule, J., before whom the matter was heard, on the 9th made an order that the plaintiff “be at liberty to discontinue on payment of costs, the plaintiff hereby undertaking to pay such costs when taxed, and consenting, that, in default of payment of such costs within ten days from the 31st instant, the defendant be at liberty to sign judgment of non pros.

Upon the taxation, the plaintiff's attorney protested against the master's taxing or allowing to the defendant any of the items in the defendant's bill of costs incurred previously to the service of the issue and suggestion and notice to plead upon the present defendant: but the master gave his allocatur for the whole costs of the action, amounting to 57*l.* 1*s.*

Norman obtained a rule calling upon the defendant to shew cause why the master should not be at liberty to review his taxation ; or why, on payment by the plaintiff to the defendant, or her attorney, of the costs occasioned by the order of Maule, J., the plaintiff should not be at liberty to abandon the said order. He referred to the statutes 3 & 4 W. 4, c. 42, s. 2 (a), and 15 & 16 Vict. c. 76, s. 138 (b), and to the case of *Wollen v. Smith*, 9 Ad. & E. 505, 1 P. & D. 375.

1855.

BENGE
v.
SWAINE.

(a) Which, reciting that "there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his life-time, nor for certain wrongs done by a person deceased in his life-time to another in respect of his property, real or personal," for remedy thereof enacts "that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his life-time, for which an action might have been maintained by such person, *so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person* ; and the damages, when recovered, shall be part of the personal estate of such person ; and, further, that an action of trespass, or trespass on the case, as the case may be, may be

maintained against the executors or administrators of any person deceased, for any wrong committed by him in his life-time to another in respect of his property, real or personal, *so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person* ; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

(b) Which enacts, that, "in case of the death of a sole defendant, or sole surviving defendant, where the action survives, the plaintiff may make a suggestion, either in any of the pleadings, if the cause has not arrived at issue, or in a copy of the issue, if it has so arrived, of the death, and that a person named therein is the executor or administrator of

1855.

BENGE
v.
SWAINE.

Have shewed cause. Prior to the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, the action would have abated by the death of Page; but a fresh action might have been commenced within six months against the administratrix. The 138th section of that act, however, allows a suggestion of the death to be

the deceased; and may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice, signed by the plaintiff or his attorney, requiring such executor or administrator to appear within eight days after service of the notice, inclusive of the day of such service, and that in default of his so doing the plaintiff may sign judgment against him as such executor or administrator; and the same proceedings may be had and taken in case of non-appearance after such notice, as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and, in case no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time; and, in case the plaintiff shall have declared, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion; and, in case the defendant shall have

pleaded before the death, the new defendant shall be at liberty to plead to the suggestion, only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless, by leave of the court or a judge, he should be permitted to plead fresh matter in answer to the declaration; and, in case the defendant shall have pleaded before the death, but the pleadings shall not have arrived at issue, the new defendant, besides pleading to the suggestion, shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; and, in case *the plaintiff* shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator."

entered, the effect of which is to continue the action. That course has been adopted here, and the administratrix has pleaded to the suggestion,—that the supposed wrongs were not committed by Page within six calendar months next before his death,—and that she was not served with a copy of the writ or suggestion, or with notice, as required by the 15 & 16 Vict. c. 76, s. 138, within six months next after she took upon herself the administration of Page's estate. The plaintiff thereupon finding that he could not effectually proceed with the action, took out a summons for leave to discontinue *on payment of the costs of the pleas to the suggestion*. The learned judge before whom that summons came on to be heard made an order giving the plaintiff leave to discontinue *on payment of costs generally*. And the master has accordingly taxed the defendant the whole costs of the cause. There is no ground to find fault either with the order or the taxation. The administratrix is clearly entitled to the whole costs of the cause: the estate of the intestate is damnified to the extent of the whole costs. [*Jervis*, C. J. The estate would have lost the costs on the death of the defendant, if the action had not been continued under the 3 & 4 W. 4, c. 42, s. 2. *Maule*, J. The defence is, that the action does not survive.] The issues originally joined on Page's pleas are still to be tried, as well as the issues to be joined on the pleas to the suggestion. It is like the case of a plea of the statute of limitations; in which case the plaintiff is liable to costs if the plea is proved. [*Jervis*, C. J. Would the administratrix have been liable for the costs of the issues on the original pleas, if she had failed upon them, and succeeded upon the other issues?] Yes, the estate would be liable. The concluding words of the 138th section draw a distinction between the two sets of costs. The administratrix should have all the costs, just as the plaintiff would if he

1855.

 BERGE
 v.
 SWAINE.

1855.

BENGE
v.
SWAINE.

had succeeded. [*Jervis*, C. J. The statute does not say what shall happen with respect to costs, if the defendant succeeds. *Maule*, J. If a new action were brought, the pleadings would be the same.]

Then, as to the other branch of the rule,—Having acted upon the order, and taken his chance on it, the court will not allow the plaintiff now to abandon it.

Norman, in support of his rule. The continuance of the suit against the personal representative within six calendar months after she had taken upon herself the administration of the estate and effects of the deceased, was a condition precedent. But for the special remedy given by the 3 & 4 W. 4, c. 42, s. 2, the action would have abated: the judge would have had no jurisdiction to try the matter at all. [*Crowder*, J. The plaintiff's remedy as against the administratrix is revived by the suggestion.] Yes. And, if the plaintiff pays her all the costs which she has incurred in consequence of his abortive attempt to make her a party, he pays her all she can in justice be entitled to. In *Rex v. Cohen*, 1 Stark. N. P. C. 511, one of two plaintiffs having died after issue joined, and the record having gone down to trial without a suggestion of that fact, according to the statute 8 & 9 W. 3, c. 11, s. 6, it was held that the trial was extra-judicial, and that consequently perjury could not be assigned upon any false evidence given thereon. If the plaintiff here were to carry the cause down for trial, the issues to be first tried would be those joined upon the pleas to the suggestion. If those issues were found for the defendant, there would be an end of the matter. In *Garland v. Extend*, 1 Salk. 194, 2 Ld. Raym. 992, the defendant having pleaded in abatement, the plaintiff demurred, and judgment was given for the defendant; and it was held that he was not entitled to costs upon the statute 8 & 9 W. 3,—“for, the judgment

in this case is not given upon the merits, but quod billa cassetur; and the statute meant only to give costs where the merits of the cause were determined upon the demurrer. If judgment had been for the plaintiff upon this demurrer, it had not been final, but only a respondeas ouster, and the *plaintiff* could have had no costs by the statute, which, therefore, ought to have the same exposition as to the *defendant*." In *Pocklington v. Peck*, 1 Stra. 638, costs were not allowed where a scire facias was abated by a plea. *Price v. Morgan*, 1 P. & D. 376, 9 Ad. & E. 505, very closely approaches the present case. A fiat in bankruptcy issued against the defendant on the 21st of April, 1837. A declaration in the cause was delivered on the 26th of October following, and on the 1st of November the defendant obtained his certificate, which he pleaded on the 25th of November puis darrein continuance, and there was no other plea. On the 10th of April, 1838, the plaintiff was ruled to reply, and on the 23rd gave notice that he abandoned the action, and intended to prove under the defendant's commission. He then obtained an order to stay the proceedings, which was ultimately rescinded on the authority of *Augarde v. Thompson*, 2 M. & W. 617. On the 30th of June, the plaintiff entered a nolle prosequi, on which the master taxed the defendant his full costs. On the 25th of October, the plaintiff was served with notice, that, unless costs were paid within four days, judgment of non pros. would be signed. The court allowed the plaintiff to stay proceedings without costs. The principle of all these cases seems to be, that, where the action was originally brought properly, but, in consequence of something occurring subsequently, it becomes inexpedient to proceed with it, the plaintiff is not to be visited with costs. In the present case, the administratrix could not have compelled the plaintiff to go on. [*Maule, J.* You have elected to go

1855.

 BERGE
v.
SWAINE.

1855.

BENGE
v.
SWAINE.

on: you have walked deliberately into a scrape.] And we are willing to pay the administratrix all the costs to which she has been put by our election, viz. the costs of pleading to the suggestion. [Jervis, C. J. You can only discontinue on payment of all the costs which your opponent would have got if you had gone on and had failed. Maule, J. If the issues on the suggestion had been found for the defendant, it would have entitled her to all the costs of the cause.] It is submitted that neither of the statutes entitles the defendant to those costs: the 3 & 4 W. 4, c. 42, s. 2, does not touch the case at all; and the 15 & 16 Vict. c. 76, s. 138, only extends to cases where the action survives.

JERVIS, C. J. I am of opinion that this rule must be discharged. There is no doubt as to the practice in the cases put, of pleas in abatement and pleas puis darrein continuance; but it has no application to a case of this sort, where the plaintiff, for reasons best known to himself, wishes to discontinue the action. I see nothing to take the case out of the ordinary rule. The 3 & 4 W. 4, c. 42, s. 2, for the first time enabled actions to be brought against executors or administrators in respect of wrongs committed by the testator or intestate within six months before his decease, so as such actions be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate of the party. Then comes the Common Law Procedure Act, which provides, that, in case of the death of a sole defendant, where the action survives, the plaintiff may, on suggesting the death, and giving a certain notice, proceed against the personal representative. The object of the act was, to place the personal representative, in the cases provided for, in the same position as if he had been the original defendant upon the record,—to substitute the one for the

other, and so avoid the necessity of commencing a fresh action: and the act (s. 138) provides, that, "in case *the plaintiff* shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator." The only difficulty arises from the absence of all mention in the act about costs in the event of *the substituted defendant* succeeding on the trial. But common justice requires that the like result should follow, and that the defendant should have all the costs to which the estate of the testator or intestate has been put by reason of his having had an action wrongfully brought against him. That being so, there is nothing to take this case out of the ordinary rule, which requires a plaintiff to pay costs where he elects to discontinue his proceedings. I also think there is no pretence for that part of the rule which seeks to rescind the order of my Brother Maule. That order was properly made. The plaintiff has deliberately acted upon it, taking the chance of the master's deciding as he wished. He cannot now be permitted to retrace his steps. The rule must be discharged with costs.

1855.

 BENGH
 v.
 SWAINE.

MAULE, J. I also think the rule should be discharged with costs. I thought it was the ordinary case of an application by a plaintiff for leave to discontinue. That is a sort of rule that a plaintiff usually obtains when he does not choose to go on with the action, and is only to be obtained upon the terms of payment of costs. I think the defendant in this case is entitled to have all the costs which she would have been entitled to if the suit had gone on to its natural termination. Upon such an application, the court does not consider whether or not

1855.

BENGE
v.
SWAINE.

the action was well brought in the first instance. Having put the administratrix by means of the suggestion in the situation of a defendant, there is no reason why the plaintiff should be permitted to retire from the contest upon terms different from those which the law would have imposed upon him if the action had been brought against her originally. We cannot speculate as to how the issues would have been disposed of, if the plaintiff had proceeded to try them. For some reason,—no doubt, a very good one,—the plaintiff now wishes to discontinue. He must pay the costs. By the 138th section of the Common Law Procedure Act, if the plaintiff had gone on to trial, and had succeeded, he would have recovered all his costs, just in the same way as he would if the action had originally been commenced against the administratrix. Nothing that has been urged by the counsel for the plaintiff has induced me to come to the conclusion that the defendant would not be entitled to her costs to an equal extent, if she were successful: and those are the costs which are given by the words of the order in question,—“on payment of costs.” In so deciding, we are not barring the plaintiff from proceeding, if he has any good cause of action. Having obtained an order to discontinue upon the usual terms, and having acted upon it, the plaintiff now asks to be allowed to abandon that order, that he may, by demurring to the pleas to the suggestion, try a speculative issue of law in a proceeding in which he admits that he cannot recover a farthing. I think he clearly ought not to be permitted to do so.

CRESSWELL, J. I am entirely of the same opinion. The substance of the 138th section of the Common Law Procedure Act seems to be, that, where the cause of action survives, whether by force of the common law or by statute, the plaintiff is to be at liberty, by a sug-

gestion of the death of the defendant, to incorporate in the proceedings against the personal representative all the previous steps in the action as against the testator or intestate. All these become steps in the action against the executor or administrator; and it is only on payment of all the costs incurred thereby, that the plaintiff ought to be allowed to discontinue.

1855.

BENGE
v.
SWAINE.

CROWDER, J. I am of the same opinion. By the 138th section of the Common Law Procedure Act, the personal representative of the deceased defendant is put in the same position as if the action had been brought against her originally. The plaintiff would have had all the costs of the action if he had gone to trial and succeeded. So, the statute 4 Jac. 1, c. 3, would have given the defendant all the costs if she had been successful. Under these circumstances, the plaintiff applies for leave to discontinue. He clearly must pay all the costs he would have had to pay if he had gone to trial and had failed.

Rule discharged, with costs.

1855.

In re OLLERTON.

Motion to take off the files of the court a certificate of acknowledgment, on the ground of one of the commissioners being interested in the transaction giving occasion for the acknowledgment.

3 & 4 W. 4,
c. 74, s. 77.

THE 77th section of the 3 & 4 W. 4, c. 74, enables every married woman, in every case except that of being tenant-in-tail, for which provision was already made by the act (s. 40), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, might have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which might be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as thereafter directed.

Section 79.

The 79th section enacts, "that every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant-in-tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in Chancery, or before two of the perpetual commis-

sioners, or two special commissioners, to be respectively appointed as thereafter provided."

1855.

In re
OLLERTON.

Section 80.

The 80th section enacts, "that such judge, master in Chancery, or *commissioners* as aforesaid, before he or *they* shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and, in such case, such deed shall, so far as relates to the execution thereof by such married woman, be void."

The 84th section enacts, "that, when a married woman shall acknowledge any such deed as aforesaid, the judge, master in Chancery, or *commissioners* taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, *subject to any alteration which may from time to time be directed by the court of Common Pleas*, shall be to the following effect; viz. 'This deed, marked &c., was this day produced before me [or '*us*'], and acknowledged by — therein named to be her act and deed; previous to which acknowledgment, the said — was examined by me [or '*us*'], separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.' And the said judge, master in Chancery, or *commissioners* shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the court of Common

Section 84.

Memorandum.

1855. Pleas, shall be to the following effect; viz. 'These are to certify, that, on &c., before me the undersigned (judge or master in Chancery), [or 'before us, A. B. and C. D., two of the perpetual commissioners, &c.'] appeared personally —, the wife of —, and produced a certain indenture, marked &c., bearing date &c., and made between &c., and acknowledged the same to be her act and deed: And I [or 'we'] do hereby certify that the said — was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me [or 'us'], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.' "
- In re
OLLEBTON.
Certificate.
- Section 85. The 85th section enacts that the certificate, together with an affidavit by some person verifying the same and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with the proper officer, and *filed of record* in the court of Common Pleas.
- Section 86. The 86th section enacts, that, on the filing of the certificate, "the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment."
- Section 89. And the 89th section enacts, that the court of Common Pleas shall "from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits

verifying the certificates, and the time within which any of the aforesaid proceedings shall take place," &c.

In pursuance of this last-mentioned provision, the court of Common Pleas, in Michaelmas Term, 4 W. 4, 1833, made certain rules; by one of which the form of the certificate given by the 84th section of the statute was slightly varied, and by another of which it was provided, that, "where the acknowledgments shall be made before commissioners appointed under the said act, *one at least* of the said commissioners shall be a person who *is not concerned as the attorney*, solicitor, or agent, or clerk to the attorney, solicitor, or agent, *of any of the parties in the transaction giving occasion to the taking of such acknowledgment*; and that, in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof (amongst other things), that *one at least* of the commissioners taking such acknowledgment *is not the attorney*, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any of the said parties." And the form of affidavit, to be made by one of the commissioners, contains the following passage,—“And this deponent further saith, that *he, this deponent* [or, ‘the said I. K.,’ *as the case may be*; adding, if *not the commissioner making the affidavit*, ‘whose place of residence is at —’], *is not concerned as the attorney*, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any or either of the parties to the transaction giving occasion to the taking such acknowledgment: And this deponent further saith, that, in pursuance of the order made by the court of Common Pleas in Michaelmas Term, 1833, *the said commissioners* did inquire of the said — whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision,” &c. &c.

1855.

In re
OLLEERTON.

Rules of Michaelmas, 4
W. 4.

1855.

In re
OLLEETON.Substituted
rules, of Hil-
lary, 4 W. 4,
1834.

The rules so made in Michaelmas Term, 1833, were revoked in the following term, and new provisions made in lieu thereof. By one of these substituted rules it is provided, that, "where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, *one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.*"

And by another of those rules it is provided that the affidavit verifying the certificate,—which certificate shall, except where the acknowledgment is taken elsewhere than in England, Wales, or Berwick-upon-Tweed,—shall be made by some practising attorney or solicitor, and shall state, amongst other things, "that *one at least of the commissioners* taking such acknowledgment, to the best of his, deponent's, knowledge or belief, *is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.*"

Form of affidavit.

And it is further provided that the affidavit shall be in the form annexed, "subject to such variations as the circumstances of the case shall render necessary, or such affidavit may be made, where it is found convenient, by one of the said commissioners, with such variation as shall be necessary in that behalf." And the form of affidavit contains these words:—"And this deponent further saith, that, to the best of this deponent's knowledge and belief, neither of the said commissioners is [or, '*the said A. B.,*' or '*the said C. D., one of the*

said commissioners, is not'] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned."

1855.

In re
OLLERTON.

An action of ejectment having been brought to recover possession of a dwelling-house and premises at Hindley, in Lancashire, and a special case stated for the opinion of the court of Exchequer, the plaintiff's claim was defeated by a deed which was prepared by *John Lord* and *W. Ackerley*, who were the only solicitors employed in the transaction, and was executed by *John Ollerton* (the defendant) and *Ellen* his wife, *and was acknowledged by the latter before the said John Lord (who took thereunder an interest as mortgagee to the extent of 80l.) and one Edward Woodcock, perpetual commissioners for taking the acknowledgments of married women,—Woodcock not being in any manner interested in the transaction giving occasion for the acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. The commissioners, Lord and Woodcock, signed a certificate of their having taken such acknowledgment, in the form pointed out by the statute; and such certificate, accompanied by the affidavit required for verifying the same, was duly filed of record,—the affidavit being made by Woodcock, and being in the form prescribed by the rules of Hilary Term, 1834, as to the want of such interest or concern as aforesaid in the transaction by Woodcock.*

Upon the argument of the special case,—see *Bancks v. Ollerton*, 10 Exch. 168,—it was objected, on the part of the plaintiff, that, the acknowledgment of the deed by *Mary Ollerton* not having been taken in the manner prescribed by the statute, the deed was void: but the

1855.

In re
OLLERTON.

court were of opinion, that, so long as the certificate and affidavit remained *filed of record*, they were conclusive evidence that the acknowledgment was duly taken, and that, "if the certificate was not warranted by the act, and ought not to have been given, the remedy was by application by the party aggrieved to the court of Common Pleas to quash the certificate and take it off the file, as having been improperly or irregularly made."

Knowles, in Trinity Term last, upon an affidavit disclosing the above facts, moved for a rule calling upon John Ollerton, and upon John Lord and W. Ackerley, the two commissioners, to shew cause why the certificate and affidavit verifying the same should not be taken off the files of the court, and the certificate quashed, for irregularity. He submitted that the practice founded upon the rules of court, was not warranted by the provisions of the statute; and that it was contrary to the first principles of justice that a man should be permitted to act judicially in a matter in which he is directly and pecuniarily interested.

JERVIS, C. J. The construction generally put upon these rules in the country,—especially since the case of *In re Ann Scholefield*, 3 Scott, 657, 3 N. C. 293,—has been, that, if *one* of the commissioners taking the acknowledgment is a disinterested person, that will suffice. The rule may go, and notice should be served upon the registrar, and upon Woodcock, the co-commissioner of John Lord.

Atherton and *Hutton*, on a subsequent day, shewed cause. This is an application to the discretion of the court; and, considering the lapse of time which has taken place (the party having died in the meantime), and the absence of any suggestion of fraud, the court will not interfere. [*Jervis*, C. J. You must not assume

that it is matter of discretion. *Maule, J.* The circumstance of the commissioner's being interested as attorney in the transaction, is a violation of *the rule of court*; but that which is now complained of is a violation of the statute, or something more. I presume nobody will suggest that the court of Common Pleas could make a judge competent who by the common law is not so. The fact of a judge being interested was held in a recent case to be ground of error. (a) *Jervis, C. J.* The rules are clearly not in accordance with the act of parliament.] Assuming that the court exceeded its authority in framing these rules, it would be most inconvenient and unjust that the titles of parties who have acted in obedience to them should be thereby placed in peril. Besides, the effect of the statute, is, to make the certificate when filed *conclusive* evidence. It has all the force of a record, and cannot be avoided by any irregularity in the conduct of the judge. See 18 Edw. 1, stat. 4; 2 Inst. 515, 516; Coke's Seventh Reading on Fines (b);

1855.

 In re
OLLERTON.

(a) *Dimes v. The Grand Junction Canal Company*, 3 House of Lords Cases, 759. A public company, which was incorporated, filed a bill in equity against a landowner, in a matter largely involving the interests of the company: the Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds,—a fact which was unknown to Dimes (the defendant in the suit). The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor. It was held, by

the House of Lords, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge in the cause, and that his decree was therefore voidable, and must consequently be reversed; but that he was not disqualified from performing the ministerial act of enrolment, which is required before a decree of the Vice-Chancellor can be appealed against. It was further held, that the disqualification did not affect the decree of the Vice-Chancellor, who, though by the 53 G. 3, c. 24, subordinate to, is not dependent on, the Lord Chancellor.

(b) Coke's Law Tracts, p. 245.

1855. Sheppard's Touchstone, 6; 1 Cruise on Fines, 38 (a);
 In re *Argenton v. Westover*, Cro. Eliz. 275, cited Cruise Dig.
 OLLERTON. tit. xxxv, ch. iv. § 26; *Hungate's Case*, 12 Co. Rep.
 122 (b); *Mansfield's Case*, 12 Co. Rep. 124 (c); *War-*
combe and Carrel's Case, 12 Co. Rep. 124. b. (d); *Eddle-*
stone v. Collins, 3 De Gex, M'N. & G. 1.

Knowles and *Mellish*, in support of the rule. The applicant having his title barred by a record of this court, which, though regular upon the face of it, is shewn to be in its creation a violation not only of the statute upon which it professes to be founded, but also of one of the first principles of justice, and being without other remedy, is clearly entitled to call upon the court for relief in this way. That which is complained of would, in the case of a fine, for which the proceeding

(a) "It is a principle of the common law, that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question; so that no averment can be made against any fact which is once upon record; and therefore, when the foot or chirographum of a fine is recorded, no averment can be made as to the caption or time of its acknowledgment, but it must be considered as a fine of that term in which it is recorded; nor can it be falsified, until it is vacated or reversed by the court of Common Pleas,"—that is, by writ of error.

(b) "If an infant is permitted to levy a fine, and such fine is not reversed during his minority, it will for ever afterwards stand good." 1 Roll. Rep. 113.

And it was resolved, "that, forasmuch as no corruption and circumvention was proved in the commissioners, or in any of the parties, of which they may be indicted at the suit of the King, or punished in this court, the fine shall stand."

(c) "A fine levied by an idiot is unavoidable, although his idiocy is apparent; and although, after the fine levied, he has been found by inquisition an idiot à nativitate. The indentures executed by such infant are sufficient to direct the uses of the fine."

(d) "A man persuaded his wife, an infant, to levy a fine of her inheritance, and cognizance was taken by dedimus protestatam, there being several judges who might have examined her:—Held, such fine is good."

in question is substituted, have been set right by writ of error: Com. Dig. *Fine* (H. 3.); *Charnock and Worsley's Case*, 1 Leonard, 114. No doubt, as Lord Coke observes, a man cannot be permitted to aver against a record: but Lord Coke could not have meant to say that a fine would be held good, if the judge before whom the acknowledgment was taken was himself the conusee; for, in such a case, the fine is *void*,—Wilson on Fines, 35. This court had no power, under the statute 3 & 4 W. 4, c. 74, to frame rules which should operate in contravention of the common law, as the rules in question clearly do. The statute requires that the acknowledgment shall be taken before *two* commissioners, and that the *two* shall examine the married woman, and *both* shall certify that they have done so. The memorandum required by the 84th section to be indorsed or written on the deed, shews that. [*Jervis*, C. J. There can be no doubt about that. The difficulty is as to what the court is to do with it, this being a record.] They can only take it off the file. [*Maule*, J. The framers of this act certainly could not have lost sight of the fact that a fine was reversible on error. It may be suggested, that, inasmuch as they have made no provision for an irregularity of this sort, the legislature intended that the proceeding should be irreversible. The answer to that is, that it is not possible to conceive that they could have intended that the estates of strangers should be affected, and that there should be no remedy. Many instances are put in Wilson on Fines, pp. 16 et seq., where fines improperly levied have notwithstanding been held not to be avoidable. *Mansfield's Case* is certainly a very strong one.] There, the party taking the acknowledgment, though highly censurable, was not guilty of fraud: he was not a party interested in the transaction. Here, the court has had imposed upon it a false and fraudulent record: surely

1855.

 In re
OLLERTON.

1855.

 In re
 OLLERTON.

it cannot be permitted to remain upon its files. [*Jervis*, C. J. In the old cases referred to, the party who took the acknowledgment was properly constituted: here, the commissioner Lord was not. *Maule*, J. The filing of the certificate is an ex parte proceeding. It would be hard if such a wrong should be without remedy.] In *Nokes*, plaintiff, *Styles*, deforciant, 3 Taunt. 49, the court refused to allow the acknowledgment of a fine to be amended, where it was taken, in Westminster, before commissioners other than a judge or a serjeant. "The fine," they said, "was irregularly taken, being in direct contradiction to a standing rule of the court, and the parties sought to cure it by requesting the court to sanction a fraud on their own rule." No great hardship will be done by making this rule absolute; for, it does not appear that there has been any subsequent conveyance of the property: and it would be equally hard upon the applicant to be deprived of his legal rights by an irregular and unauthorised proceeding of this sort. Where a party has another remedy, the court will sometimes decline on a summary application to exercise its discretion in his favour: but, where the party would otherwise be without remedy, the exercise of its discretion by the court is ex debito justitiæ. [*Maule*, J. If the court sees reason to believe that great injustice or inconvenience would arise from the exercise of its discretion, it usually abstains from exercising it. But I must confess I do not see that any great inconvenience is likely to arise here: it is not necessary to say,—Fiat justitia, ruat cælo.]

Cur. adv. vult.

In the course of the vacation, an act of parliament was passed for the express purpose of meeting the difficulty suggested by the above case. That act, 17 & 18 Vict. c. 75, which is intituled "An act to remove

1855.

In re
OLLETON.

doubts concerning the due acknowledgment of deeds by married women in certain cases," after reciting, that, by the 3 & 4 W. 4, c. 74, "it is provided that every deed to be executed by a married woman for any of the purposes thereof, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant-in-tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in Chancery, or before two of the perpetual commissioners or two special commissioners to be respectively appointed as therein provided, and a certificate of the taking of such acknowledgment is thereby directed to be lodged with some officer of the court of Common Pleas at Westminster, who is directed, after satisfying himself that the requisitions of the said act have been complied with in manner therein mentioned, to cause the said certificate to be filed of record in the said court of Common Pleas: and whereas it is apprehended that deeds executed by married women under the provisions of the said act may be liable to be invalidated by the circumstance that the judge, or master in Chancery, or one or both of the commissioners, taking the acknowledgment, may be or may have been interested or concerned, either as a party or otherwise, in the transaction giving occasion for such acknowledgment, and it is not expedient that deeds executed in good faith under such circumstances should be invalidated,"—in s. 1, enacts, that "no deed which has been acknowledged, or which shall hereafter be acknowledged, by a married woman before a judge of one of the superior courts of Westminster, or a master in Chancery, or before two of the perpetual commissioners or two special commissioners appointed as by the said

1855.

In re
OLLERTON.

act is required, shall be impeached or impeachable at any time after the certificate of such acknowledgment has been filed of record in the court of Common Pleas at Westminster, by reason only that such judge or master in Chancery, or such commissioners, or either of them, was or were interested or concerned, either as a party or parties, or as attorney or solicitor or clerk to the attorney or solicitor of one of the parties, or otherwise, in the transaction giving occasion for such acknowledgment."

And s. 2 provides, "that, if any proceeding instituted before the 13th of July, 1854, in the said court of Common Pleas, for the purpose of quashing or taking off the file of records of the said court any certificate of an acknowledgment of a deed by a married woman, on the ground that such judge or master in Chancery, or either of such commissioners, was interested or concerned as aforesaid, shall be pending at the passing of this act, it shall be lawful for the said court to proceed with and dispose of the same as if this act had not passed, except that, if the said court shall be satisfied that any person or persons acting *bonâ fide* has or have been induced by the terms of the orders made by the said court in Hilary Term, 1834, to acknowledge, or to accept a title depending on the acknowledgment of, any deed or deeds before commissioners, one of whom may have been interested or concerned as aforesaid, the said court may refuse to permit the certificate to be quashed or taken off the file, on such terms as to the payment of costs and expenses as the said court shall think fit to make."

And the 3rd section impowers the court from time to time to make any rules which to them may seem fit for preventing any commissioners interested or concerned as aforesaid from taking any acknowledgment under the said recited act, anything therein contained to the con-

trary notwithstanding ; so, nevertheless, that no such rule shall make invalid any acknowledgment after the certificate shall have been filed of record as aforesaid.

1855.

In re
OLLEERTON.

Atherton, in the following term, referring to the statute, submitted that this case was within the saving provisions of the 2nd section, and accordingly prayed that the rule might be discharged.

No opposition being offered on the other side,

JERVIS, C. J., said : We think we may avail ourselves of the provision contained in the second section, and discharge this rule with costs.

Rule discharged, with costs.

END OF HILARY TERM.

1855.

IN THE EXCHEQUER CHAMBER.

THE SOUTH-EASTERN RAILWAY COMPANY *v.*

RICHARDSON.

Feb. 5, 1852.

In an action under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, to recover compensation in respect of lands "damaged or injuriously affected" by the execution of the works of a railway company, the declaration stated that the plaintiff claimed 1000*l.*, that the company had notice of his claim, and offered him 60*l.*, and that a jury impanelled pursuant to the provisions of the act awarded him 215*l.* :—Held, by the Exchequer Chamber, affirming the judgment of the court below, that the plaintiff was entitled to the costs of the inquiry before the sheriff,—the 51st section, which provides for such costs, being virtually incorporated in the 68th.

THIS was an action of debt. The declaration stated, that, before and at the time of the giving the notice thereafter next mentioned, and after the passing of the Lands Clauses Consolidation Act, 1845, and after the passing of the Railways Clauses Consolidation Act, 1845, and after the passing of a certain other act of parliament made and passed in the session of parliament holden in the ninth and tenth years of the reign of her present Majesty, intituled "An act to make a railway from the London and Greenwich Railway to Woolwich and Gravesend," the plaintiff was seised of the inheritance in fee-simple in possession of an estate situate and being in Marshall's Grove, Woolwich, in the county of Kent, and adjoining the south side of the said railway authorised to be constructed, and constructed, by the defendants, under and by virtue of the provisions of the said last-mentioned act, consisting of nine messuages or cottages, with the gardens and yards in the rear thereof, and being No. 1 to No. 9 inclusive in the said Marshall's Grove: That, by reason of the last-mentioned railway having intersected and cut off the roadway adjoining the north side of the said estate of the plaintiff, and having thereby destroyed or obstructed the immediate approaches thereto; and also by the execution of the works by the last-mentioned act authorised to be

the sheriff,—the 51st section, which provides for such costs, being virtually incorporated in the 68th.

executed, and by the construction of the said last-mentioned railway, the said estate of the plaintiff was greatly damaged and injuriously affected: That, before the giving of the said notice thereafter next mentioned, to wit, on the 1st of January, 1849, the defendants took possession of and seized and converted to the purposes of their aforesaid railway, or the works connected therewith, a piece of ground at the north east angle of one of the aforesaid messuages or cottages, by reason whereof the said estate of the plaintiff was further greatly damaged and injuriously affected, and the plaintiff, by reason of the several premises aforesaid, sustained a loss, and claimed to be entitled to compensation in respect thereof from the defendants, to an amount exceeding 50*l.*, to wit, to the amount of 1000*l.*: That, afterwards, the plaintiff being so interested in the said estate, and the same being so injuriously affected as aforesaid, and the plaintiff having sustained such loss as aforesaid, and being entitled to compensation in respect thereof as aforesaid, and being desirous of having the question of compensation settled by a jury, to wit, on the 9th of March, 1850, he the plaintiff did give a notice in writing to the defendants, and did thereby and therein state to the defendants the said nature of his interest in the said hereditaments in respect of which he claimed compensation, and that he claimed from the defendants compensation in respect of the said loss and injury, and that 1000*l.* should be paid by the defendants to him the plaintiff for such compensation; and the plaintiff did also by the said notice state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a jury in the manner pointed out in that behalf by the Lands Clauses Consolidation Act, 1845, unless the defendants should be willing to pay the aforesaid amount of 1000*l.* as compensation, which the plaintiff thereby

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

1855. claimed, and enter, within the time limited by the said statute in that behalf, into an agreement for that purpose: That the defendants afterwards, to wit, on the 20th of March, 1850, gave to the plaintiff a certain notice in writing, whereby, after reciting the said notice so given by the plaintiff to the defendants as aforesaid, they the defendants made known to the plaintiff that they the defendants were ready and willing, and thereby offered, to pay to the plaintiff the sum of 60*l.* in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, and in respect of which the said sum of 1000*l.* was so claimed by the plaintiff as aforesaid: That the defendants did not nor would pay the amount of compensation so claimed by the plaintiff as aforesaid, nor did nor would enter into a written agreement for that purpose: That the defendants, within twenty-one days after the receipt of the said first-mentioned notice to them so given as aforesaid, to wit, on the 28th of March, 1850, did, according to the form of the first-mentioned statute, issue their certain warrant in writing, under the common seal of the defendants, and directed to the sheriff of the county of Kent, whereby, after reciting and referring to the several notices aforesaid, the defendants, pursuant to the powers and authorities given to them by the statutes in that behalf, required the said sheriff to nominate and summon a special jury to inquire of and assess the compensation, if any, to be paid to the plaintiff in respect of the several supposed matters in his said notice alleged, or any of them, in respect whereof he had therein claimed compensation; and the defendants did by their said warrant further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry, as were authorised and required to be done by the Lands Clauses Consolidation Act, 1845, and by the

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

said company's act: That afterwards, to wit, on the 24th of April, 1850, within the said bailiwick of the said sheriff, to wit, at Woolwich, in the county of Kent, a certain inquisition was taken in pursuance of and in accordance and compliance with the last-mentioned request, before Matthew Bell, Esq., then being sheriff of the said county of Kent, by A. B., C. D., &c., twelve honest, lawful, sufficient, and indifferent men of the said county qualified to serve on juries for trials of issues in Her Majesty's courts of record at Westminster, who were duly impannelled, summoned, returned, and drawn pursuant to the provisions of the statute in that behalf, by the said Matthew Bell, at the time of the said request, and then, being sheriff of the said county of Kent as aforesaid, and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to, to be inquired of, assessed, ascertained, and determined by them, in manner therein mentioned; and the plaintiff and the said defendants, by their counsel respectively, having, at the time and place of the holding the said inquisition, appeared before the said sheriff and the said jurors, and having respectively adduced evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors, upon their oath did find their verdict that the plaintiff had sustained damages to the amount of 215*l.*, by means of the several matters mentioned in his said notice, and that the defendants should pay to the plaintiff the said sum of 215*l.*; and the said sheriff did then and there, accordingly, pursuant to the statute in that behalf, give judgment for the said sum of 215*l.* so assessed by the said jury, to be paid by the defendants to the plaintiff according to the provisions of the said statutes; and the said verdict and judgment were then and there, to wit, at

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

the time and place of holding the said inquisition as aforesaid, duly signed by the said sheriff: That, the said verdict and judgment, being so duly signed as aforesaid, were afterwards, and before the commencement of this suit, to wit, on the 1st of May, 1850, duly deposited and left by the said sheriff with the clerk of the peace of the said county of Kent, to be by him kept, and the same are now by him kept, amongst the records of the Quarter Sessions of the said county of Kent, and the said verdict and judgment still remained among the records of the said Quarter Sessions of the said county of Kent, in full force and effect, and in no wise satisfied, reversed, or annulled: That the said sum of 215*l.* for which the verdict of the jury was so given as aforesaid, was and is a greater sum than the said sum of 60*l.* so previously offered by the defendants as aforesaid; by reason whereof the defendants became and were liable to pay to the plaintiff his the plaintiff's costs of the said inquiry: That afterwards, and before the commencement of this suit, to wit, on the 1st of June, 1850, the plaintiff's costs of the said inquiry were settled by Richard Goodrich, then being one of the masters of the court of Queen's Bench at Westminster, at a certain sum, to wit, the sum of 243*l.* 1*s.* 3*d.*,—of all which the defendants, afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice: By reason of which said premises, and by force of the statutes in that behalf, an action had accrued to the plaintiff to demand and have of and from the defendants the said sum of 215*l.*, and also the said sum of 243*l.* 1*s.* 3*d.*, amounting in the whole to the sum of 458*l.* 1*s.* 3*d.*, being the sum above demanded; yet that the defendants had not paid the said sum above demanded, &c.

Plea and demurrer.

The defendants pleaded, as to so much of the declaration as related to the said sum of 215*l.*, parcel &c., pay-

ment into court : and, as to the residue of the declaration,—viz. the claim for costs of the inquiry before the sheriff,—demurred generally.

The plaintiff joined in demurrer ; and, upon the argument of the demurrer, the court of Common Pleas gave judgment for the plaintiff below,—holding, that, although no mention is made of the costs in the 68th section of the 8 & 9 Vict. c. 18, under which the proceedings took place, the plaintiff below was entitled to them by virtue of the 51st section, which is virtually incorporated into the 68th.—Vide *antè*, Vol. XI, p. 154.

Upon this judgment, the defendants below brought a writ of error, which now came on for argument before Parke, B., Patteson, J., Alderson, B., Coleridge, J., Wightman, J., Erle, J., Platt, B., and Martin, B.

Watson, for the plaintiffs in error. The plaintiff below was not entitled to the costs of the inquiry before the sheriff under the 68th section of the 8 & 9 Vict. c. 18. That section enacts, “ that, if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled, either by arbitration or by the verdict of a jury, as he shall think fit ; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compen-

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

sation so claimed therein ; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided ; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid ; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." The section makes no provision for the costs of the inquiry where a jury is summoned : and the provision at the end of the clause, for the costs of an action, where the promoters decline or omit to issue their warrant for summoning a jury, shews the omission to have been intentional. The promoters were not bound to make an offer of compensation. The 68th section contains the sole provision for compensation in the case of lands which *have been taken* for or injuriously affected by the execution of the works. The clauses which relate to the assessing by means of a jury or an arbitrator the compensation for lands *about to be taken* by the company, or for damage *to be sustained* by the execution of the works, are the 38th to the 56th ; and in those cases the promoters are

to give notice, and to state therein what sum they are willing to pay (a), and they are liable to costs where the jury give a greater sum by way of compensation than the sum so offered. (b) The last-mentioned provision cannot apply to a case where no offer of compensation is requisite or has been made by the promoters. The result of the inquiry might be that the claimant had sustained no damage: *The Queen v. The Lancaster and Preston Junction Railway Company*, 6 Q. B. 759. It has been held that the notice mentioned in s. 38 is not necessary or applicable in the case of proceedings under s. 68: *Railstone v. The York, Newcastle, and Berwick Railway Company*, 15 Q. B. 404. That was an action of debt for the amount of compensation claimed by the plaintiff under s. 68, for lands taken by the defendants,

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

(a) The 38th section enacts, that, "before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of such works."

(b) The 51st section enacts, that, "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the

costs of such inquiry shall be borne by the promoters of the undertaking; but, if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry."

1855.
 THE SOUTH-
 EASTERN
 RAILWAY CO.
 v.
 RICHARDSON.

a railway company: the declaration alleged that the plaintiff gave the defendants notice in writing of his claim (which exceeded 50*l.*), and of his desire to have compensation assessed by a jury, that twenty-one days had elapsed, and *that the defendants did not give the plaintiff notice of their intention to issue a warrant*, nor did they issue a warrant, to summon a jury to assess compensation: the defendants pleaded, that they *did* issue a warrant within twenty-one days: on demurrer, assigning for cause that the plea, though pleaded to the whole count, left part of the breach unanswered,—it was held, by Lord Campbell, Patteson, J., and Erle, J., that *no notice was required*, and that the plea was good,—dissentiente Coleridge, J. [Coleridge, J. The court of Common Pleas in this case seem to have adopted the doubt I ventured to express in the case just cited. (a) Parke, B. Several of the clauses anterior to the 68th are applicable to the cases intended to be dealt with under that section; and I do not see why the 51st section, which provides for costs, should not apply: otherwise, the company might escape costs where they

(a) The observations of Mr. Justice Coleridge which were relied upon in the court below were to the following effect:—
 “There is a code of clauses collected together under one head, viz. the purchase of lands otherwise than by agreement; and both sections 38 and 68 are included under that head. Section 38 is the first of a series of clauses regulating the manner in which compensation is to be settled by a jury. One would say that the whole of that series would apply to juries summoned to assess disputed compensation under all circum-

stances, whether the land was actually taken or only intended to be taken; and the words used in section 38 are large enough to embrace both branches. Section 68 is confined to the case of land actually taken; but, do not the jury clauses contained in the previous sections also apply to a jury summoned under section 68? Some of them clearly do; for, the warrant is to issue ‘to summon a jury for settling the same in the manner herein provided;’ and, if some apply, why should not section 38 also apply?”

take or injuriously affect land without previous negotiation, but would be liable for costs where they proceed properly and bargain for it in the first instance.] *Coxrigall v. The London and Blackwall Railway Company*, 5 M. & G. 219, 6 Scott, N. R. 241, shews that costs can only be given by express enactment.

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

Butt (with whom was *Hugh Hill*), for the defendant in error, was stopped by the court.

PARKE, B. We are unanimously of opinion that the judgment of the court of Common Pleas in this case must be affirmed, and that upon a very clear view of the several provisions of the statute. The lands of the plaintiff below have been injuriously affected by the execution of the works of the company, and the latter have not adopted the course pointed out by the earlier sections of the act for making satisfaction. The plaintiff, therefore, is clearly entitled to demand compensation under s. 68. The statute contemplates and provides for three states of things,—first, where the amount claimed does not exceed 50*l.*; in which case the dispute is to be settled by two justices; s. 22,—secondly, where the claim exceeds 50*l.*, and the claimant is desirous of having the amount ascertained by arbitration; in which case the 68th section provides, “that, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of notice from the party entitled, the same shall be settled by arbitration *in the manner therein provided*,—thirdly, where, in the case of a claim exceeding 50*l.*, the claimant is desirous of having the question of compensation settled by a jury; in which case he may give the promoters of the undertaking notice of such his desire, and the same section (68)

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

provides, that, unless the promoters "be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same *in the manner herein provided*, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." Now, there are no subsequent provisions in the act for arbitration: so far, therefore, the 68th section must of necessity refer to the previous provisions with respect to arbitration, and among them there is a clause (s. 34) which provides for the costs of the arbitration. Neither is there any subsequent provision in the act for the summoning of a jury: the provisions as to that are contained in ss. 41—50. The 51st section enacts, that, "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but, if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry." And s. 52 provides for the taxation of such costs. We are all clearly of

opinion that the 68th section applies, amongst others, to ss. 51 and 52. The declaration in this case alleges that the plaintiff below claimed 1000*l.* by way of compensation for the injury he had sustained from the execution of the company's works, that the promoters offered him 60*l.*, and that the jury awarded him 215*l.* We therefore think that the plaintiff below was, by the combined operation of ss. 51 and 68, entitled to his costs of the inquiry.

It is unnecessary for us to say what our decision would have been if no offer had been made on the part of the promoters.

In the course of the argument, it was insisted on the part of the company, that the provision as to costs in one event in s. 68,—viz. in the event of the claimant giving them notice in writing of his desire to have the question of compensation settled by a jury, and of their declining either to pay the amount so claimed or to issue their warrant to the sheriff to summon a jury,—shews that the legislature did not intend to impose upon them a liability to costs in any other event. But it was necessary that the costs should be specially provided for in that case, inasmuch as it was one to which the clauses as to inquiries before a jury summoned under the warrant of the promoters, or before an arbitrator, would not be applicable so as to enable the claimant to get his costs under those provisions.

We do not consider it necessary to say whether or not we concur in the doubt suggested by the court below as to the propriety of the decision of the majority of the court of Queen's Bench in the case of *Railstone v. The York, Newcastle, and Berwick Railway Company*, 15 Q. B. 404; for, we think that case may be very good law, and yet the decision in the present case also may be right.

Judgment affirmed.

1855.

THE SOUTH-
EASTERN
RAILWAY CO.
v.
RICHARDSON.

1855.

COOPER v. PARKER.

Feb. 1.

Payment of a smaller sum, with an agreement to abandon a defence and pay costs, may be pleaded in satisfaction of a larger demand, whether liquidated or unliquidated.

To debt for work and labour, money lent, &c., the defendant pleaded, that, after the accruing and during the subsistence of the causes of action, and before suit, the plaintiff levied a plaint in a certain county-court to recover 50*l.* claimed to be due to him from the defendant for money lent, &c.; that the defendant defended himself against the

THIS was an action of debt for work and labour as an attorney and solicitor, for money lent, money paid, and money found due upon an account stated.

The defendant pleaded,—first, never indebted,—secondly, payment,—thirdly, that the alleged cause of action did not accrue within six years before this suit,—fourthly, that, at the time of the making of the said contracts and of the accruing of the claim in the declaration mentioned, he the defendant was an infant within the age of twenty-one years.—

Fifthly, that, after the accruing of the supposed causes of action in the declaration mentioned, and whilst the same were subsisting, and before the commencement of this suit, the plaintiff levied his plaint against the defendant in the county-court of Cheshire holden at Congleton, then having jurisdiction in that behalf, to recover the sum of 50*l.* then claimed by the plaintiff to be due from the defendant to the plaintiff, to wit, for money lent, and money paid by the plaintiff for the use of the defendant at his request, and for interest thereon from the 14th of May, 1846, and also to recover the same on an account stated; and the defendant then

said plaint, and, being an infant at the time of the accruing of the causes of action for which the plaint was levied, gave notice of a defence on that ground; that, before trial, and before the commencement of this suit, it was agreed between the plaintiff and defendant that the defendant should pay the plaintiff 30*l.*, and the costs of the plaint, and that the plaintiff should accept the said sum of 30*l.*, and the performance by the defendant of the agreement in this plea mentioned, respectively, in full satisfaction and discharge of the causes of action, &c.; and that the 30*l.* was paid to and received by the plaintiff, and the costs of the plaint paid by the defendant, &c.:—Held,—by the Exchequer Chamber, affirming the judgment of the court of Common Pleas,—that, assuming the claim in the county-court to have been for a liquidated demand, the plea was a good plea of satisfaction.

Upon the argument of a writ of error on the ground that a plea which has been found for the defendant is bad in law, it is no ground for a venire de novo, that the finding upon that plea is inconsistent with the finding on another issue.

defended himself against the said plaint, and, *being then and at the time of the accruing of the said supposed causes of action for which the said plaint was levied as aforesaid an infant* under the age of twenty-one years, gave due notice in the said suit in the said county-court that he should defend himself against the said plaint on the ground of infancy; and thereupon, and before any trial had of the said suit in the said county-court, and before the commencement of this suit, it was agreed by and between the plaintiff and the defendant, that the defendant should pay to the plaintiff the sum of 30*l.*, and that the defendant should pay the costs of the plaintiff by him incurred in the said plaint, and the defendant should make such last-mentioned payments respectively, and *the plaintiff should accept and receive the said sum of 30*l.* and the performance by the defendant of the agreement in this plea mentioned, respectively, in full satisfaction and discharge, as well of the supposed causes of action for which the said plaint was so levied as aforesaid, as of all causes of action whatsoever which the plaintiff then had against the defendant*: That afterwards, and before this suit, in pursuance and performance of the said agreement in this plea mentioned, he the defendant then paid to the plaintiff the said sum of 30*l.*, and then paid the costs of the plaintiff by him incurred in the said plaint, and the plaintiff then accepted and received from the defendant the said sum of 30*l.*, and the performance by the defendant of the agreement in this plea mentioned, respectively, in full satisfaction and discharge, as well of the supposed causes of action for which the said plaint was levied as aforesaid, as of all causes of action whatsoever which the plaintiff then had against the defendant.

The plaintiff joined issue on the first, second, third, and fifth pleas, and also on the fourth plea so far as the same related to the claim for money lent and for money

1855.

 COOPER
 v.
 PARKER.

1855.

COOPER
v.
PARKER.

found to be due upon accounts stated ; and, as to the said fourth plea, so far as the same related to the residue of the declaration, that the work and labour performed and bestowed, was work and labour necessary for and suitable to the then estate, degree, and condition of the defendant, and that the money paid and advanced was necessarily paid and advanced for necessities for and suitable to the then estate, degree, and condition of the defendant. Issue thereon.

The cause was tried before Lord Campbell, at the Chester Summer Assizes, in 1853, when a verdict was found for the plaintiff on the first four issues, and for the defendant on the fifth. The plaintiff afterwards moved for judgment non obstante veredicto on the fifth issue, but the rule was refused,—*antè*, Vol. XIV, p. 118.

A writ of error having been brought upon this judgment, the case now came on for argument, before Parke, B., Alderson, B., Coleridge, J., Erle, J., Platt, B., Martin, B., and Crompton, J.

Willes, for the plaintiff in error. There is a material inconsistency upon this record, which will entitle the plaintiff to a venire de novo, even if the court should hold the fifth plea to be a good one,—the jury finding, on the fourth plea, that the defendant was *not* an infant at the time of the accruing of the causes of action, and, for the purposes of the fifth plea, finding that he *was* an infant. [*Parke*, B. You ask for judgment non obstante veredicto. We are dealing only with the fifth plea. But, assuming that the defendant was *not* an infant, the plea is a perfectly good plea.] It is submitted that the plea is a bad plea, and that the plaintiff is either entitled to judgment non obstante veredicto or to a venire de novo. The court below, without giving any reasons for their judgment, decided that the averment of infancy was an immaterial averment, and that

the plea afforded a good defence. The plaintiff having a good cause of action for a pecuniary demand, that cause of action cannot be satisfied by any money payment short of the full amount. [*Parke, B.* That doctrine applies only to a certain ascertained debt. In *Down v. Hatcher*, 10 Ad. & E. 121, 2 P. & D. 292, the distinction between an ascertained and liquidated demand, and one which is unliquidated, did not attract attention. It has always seemed to me that the case was questionable on that account. To make this plea bad, the plaintiff should have replied that it was an ascertained demand.] It lies on the defendant to shew that the demand is unliquidated, and not upon the plaintiff to reply it. *Down v. Hatcher* has constantly been acted upon, and it cannot be disregarded without overturning *Cumber v. Wane*, 1 Stra. 426, *Fitch v. Sutton*, 5 East, 230, and numerous other authorities. (a) Another rule is, that the satisfaction must appear upon the record to be reasonable. [*Coleridge, J.* Is not the rule, that it must not appear to be *unreasonable*? *Pratt, C. J.*, says, in *Cumber v. Wane*, "It must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear." *Cumber v. Wane* is very much qualified by the court of Exchequer in *Sibree v. Tripp*, 15 M. & W. 23.] In *Sibree v. Tripp*, it was held that the acceptance of a negotiable security may in law be a satisfaction of a debt of a greater amount. [*Alderson, B.* You may give a negotiable note in satisfaction of an unliquidated debt or demand of a greater amount, but you cannot give *money*!] In *Sibree v. Tripp*, Mr. Baron Alderson observes that a man may give in satisfaction of a debt of 100*l.* a horse of the value of 5*l.*, but not 5*l.*" In *Mitchell v. Cragg*, 10 M. & W. 367, to a declaration against the acceptor of a bill of

1855.

COOPER
v.
PARKER.

(a) See the notes to *Cumber v. Wane*, 1 Smith's Leading Cases, 146.

1855.

COOPER
v.
PARKER.

exchange for 16*l.* 12*s.*, drawn by F. & G., and indorsed by them to the plaintiff, the defendant pleaded,—first, that, after the bill became due, F. & G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7*l.* 2*s.*, which, together with the price of a horse which the defendant had sold to F. & G., and the price of which it was agreed between them should be set off and allowed against the defendant's acceptance, F. & G. accepted in satisfaction and discharge of the bill; and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due,—secondly, that, before the bill came into the possession of the plaintiff, it was indorsed in blank by F. & Co. to C. & Co.; that, after it became due, it being then in the hands of C. & Co., F. & Co. gave C. & Co. another bill, accepted by them, for the same amount, which C. & Co. received on account of the first-mentioned bill, and which was paid by F. & G. at maturity; that, after the second bill was so given, the defendant paid to F. & G. 7*l.* 2*s.*, which together with the price and value of a horse which the defendant had sold to F. & G., and the price of which it was agreed between them should be set off against the defendant's acceptance, F. & G. accepted in satisfaction and discharge of the bill; that, at the time of the giving of the second bill by F. & G. as afore-said, and at the time of the said settlement between the defendant and F. & G., the bill in the declaration mentioned remained in the hands of C. & Co., and was not indorsed to the plaintiff until after the giving of the second bill by F. & G., nor until after it became due. It was held, that the pleas were bad in substance, because they did not shew that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill of exchange,—Parke, B., saying: "It is left uncertain whether the horse was

sold for a fixed price, or upon a quantum valebat. It is consistent with the statements in the pleas, that the horse was sold for 5*l.*: if that was the case, that sum, together with the 7*l.* 2*s.*, would not equal the amount of the bill, and consequently would not be any satisfaction." That case shews that the mere introduction of another matter the value of which is uncertain, does not amount to satisfaction. [*Parke*, B. I cannot see why this is not a good plea. The value of the defendant's giving up the question in the action in the county-court cannot be ascertained. In dealing with a plea of this sort, the court does not enter into a consideration of the value of the satisfaction, if the plaintiff agrees to accept it. The advantage to the plaintiff of the defendant's giving up the plea of infancy in the county-court, though an untrue one, might be great.] It is material that one should know the true value of *Down v. Hatcher*. [*Parke*, B. Assuming this to be a liquidated demand, is the plea bad?] Supposing this were an action for a liquidated demand of 45*l.*, the plea shews no answer. The plea amounts to this,—that 45*l.* being due at the time, an action is brought against the defendant in the county-court for 50*l.*, and in that action the defendant pleaded infancy at the time the cause of action arose, and that, before trial, it was agreed between the plaintiff and defendant, that the latter should pay the former 30*l.* and the costs incurred in the county-court, and that the plaintiff should receive the 30*l.* and the performance of the defendant's agreement in satisfaction of the causes of action, and that the 30*l.* and costs were accordingly paid. Everything done in the county-court sounds in a money payment. [*Parke*, B. The defendant gives up the plea of infancy, and the chance of the plaintiff's failing to recover in the county-court.] There is nothing said about the withdrawal of the plea of infancy; nor is there any allegation that the

1855.

COOPER
v.
PARKER.

1855. costs in the county-court equalled the difference between 30*l.* and 45*l.* All that the plea shews, is, that the defendant avoids the payment of the 45*l.* by the payment of 30*l.* and an uncertain amount of costs.

COOPER
v.
PARKE.

Welsby, for the defendant, was not called upon.

PARKE, B. The fifth plea is clearly a good plea of accord and satisfaction. The decision of the court of Common Pleas was quite right. Whenever the question may arise as to whether or not *Down v. Hatcher* is good law, I should have a great deal to say against it: but, this being a good plea of satisfaction, assuming the demand to be liquidated, it is unnecessary to say anything about that case. The plaintiff, besides the 30*l.*, gets rid of the plea of infancy, and also gets what it was before uncertain whether he would get, viz. the costs. It seems to me that that is a perfectly good satisfaction. The court cannot enter into a consideration of the value of the satisfaction, which upon the face of it is uncertain.

MARTIN, B. I shall always be ready to concur in such a judgment as tends to allow parties to contract for themselves what engagements they please.

ALDERSON, B. I entirely concur in the soundness of that principle.

The rest of the court concurring,

Judgment for the defendant.

INDEX

TO

THE PRINCIPAL MATTERS.

ACCORD AND SATISFACTION.

See PLEADING, III.

ACKNOWLEDGMENT.

I. *Under 3 & 4 W. 4, c. 74, s. 83,—See*
HUSBAND AND WIFE.

II. *Informality of Rules of Hilary*
Term, 1834.

Motion to take off the files of the court a certificate of acknowledgment, on the ground of one of the commissioners being interested in the transaction giving occasion for the acknowledgment. *In re Ollerton*, 796.

ACT BOOK.

A copy (unstamped) of the Act Book of the Ecclesiastical Court is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14. *Dorrett v. Meux*, 142.

ACT OF PARLIAMENT.

See INCLOSURE-ACT.
PROHIBITION.

ADMIRALTY COURT.

Jurisdiction of.

To an action for an injury to the plaintiffs' vessel by a collision in the river Thames, the defendants pleaded,

that the merits in respect of the demand by this action sought to be enforced, had been already tried and determined, and certain proceedings, to which the plaintiffs and defendants were parties, had been had in the Admiralty court, and that the merits upon which the plaintiffs sought to recover in this action were thereby and then tried, and, after *due proceedings* had and taken in the said court, and *in due form of law*, determined by that court in favour of the defendants; and that it was then held and adjudged by the said court that the collision occurred through the negligence of the plaintiffs, and not through the negligence of the defendants:—

Held, that the plea was no answer to the action, inasmuch as it did not shew upon the face of it that the Admiralty court had jurisdiction over the matter in question. *Harris v. Willis*, 710.

AFFIDAVIT.

I. *Of Service of Writ of Ejectment,—*
See EJECTMENT, I.

II. *On Motion to set aside Outlawry.*

The affidavit upon a motion to set aside proceedings to outlawry for ir-

regularity, must shew that the party making the application is duly authorised as the attorney of the defendant. *Skinner v. Carter*, 472.

III. Erasure in.

The court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. *In re Mary Bingle*, 449.

2. The jurat of an affidavit of the due taking of an acknowledgment at Sydney had an interlineation in the body of it, and an erasure in the jurat:—The court refused to allow it to be filed. *In re Tierney*, 761.

IV. Affidavits in Answer to "New Matter," under the 17 & 18 Vict. c. 125, s. 45.

Practice as to allowing affidavits to be filed in answer to "new matter," under the 45th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Simpson v. Sadd*, 757.

AGREEMENT.

See CONTRACT.

ALDERMAN.

See LANDLORD AND TENANT, IV.

AMENDMENT.

I. Of Record at Nisi Prius.

1. The declaration in an action for giving a false character of one P., a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he had dismissed P. from his employ, was, the

decrease in his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty.

It appeared at the trial that P. had been guilty of dishonesty while in the defendant's employ, but that the defendant had not mentioned that fact to the plaintiff when he recommended him to try P. It further appeared, however, that P. had not been dismissed from the defendant's employ on account of his dishonesty, but really for the reason which the defendant had assigned to the plaintiff.

The judge at the trial refused to allow the declaration to be amended by inserting an allegation "that P., whilst in the defendant's employ, was guilty of dishonesty," instead of the allegation "that P. had been dismissed from the employment of the defendant on account of dishonesty:—Held, that the amendment was properly refused,—the matter in controversy between the parties being, not whether the defendant had fraudulently suppressed the fact that P. had been guilty of dishonesty, but whether he had given the true reason for having dismissed him. *Wilkin v. Reed*, 192.

2. *Semble*, that it is for the judge at the trial, looking at the record and at the evidence, to say what is "the real question in controversy between the parties," within the meaning of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 222. *Ib.*

3. To a count for money had and received, the defendant pleaded, that the "said debt for money received became due from, and was contracted by, the defendant jointly with A., and

not by the defendant alone, nor by the two jointly and severally, but only jointly;" that, after the accruing of the causes of action in the count mentioned, the plaintiff sued A. for money had and received and in trover, and recovered a judgment against him for 100*l.* and costs; and that the causes of action in respect of which the plaintiff so recovered that judgment against A. included all the causes of action to which the plea was pleaded.

It appeared in evidence, that the defendant and A. had wrongfully converted the goods of the plaintiff by selling them; that the proceeds of the sale (150*l.*) were received by the defendant alone; and that the plaintiff had sued A., and recovered a verdict for 100*l.*, as the value of the goods so converted; but that, in consequence of A.'s insolvency, he had obtained no satisfaction.

Upon its being objected, at the trial of this action, that these facts did not sustain the plea, the judge allowed the defendant to amend by substituting for the words above in inverted commas, the following, "the said money was money received for and as being the proceeds of the sale of the goods in the last count and hereinafter mentioned:"—

Held, that the amendment was properly allowed, though the judge imposed no terms on the defendant,—and that the amended plea afforded a complete answer to the claim of the plaintiff in this action. *Buckland v. Johnson*, 145.

II. On Trial by the Record.

Upon a trial by the record, the court amended the declaration by inserting therein the true amount recovered by the judgment under the 15 & 16 Vict.

c. 76, s. 222. *Hunter v. Emmanuel*, 290.

III. Of Special Case.

The court will not allow a special case to be amended, by raising a point which the parties have not raised for their consideration. *Hills v. Hunt*, 1.

IV. Of Pleadings after Argument,—
See *Canham v. Barry*, 621.

APPEAL.

I. On Motion for New Trial.

Semble, that the 34th and 35th sections of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125,—are not retrospective, though the 44th section is. *Jenkins v. Betham*, 189.

II. From Decisions of Revising Barristers,—See REGISTRATION OF VOTERS.

III. From the County-Court,—See COUNTY COURT, I.

APPRAISEMENT.

See ARBITRAMENT, I.

ARBITRAMENT.

I. Submission.

1. *What amounts to.*—The plaintiff's declared against the defendants, as sureties, upon a deed, dated the 30th of March, 1853, between A., of the first part, the plaintiffs (a corporation) of the second part, and the defendants of the third part, whereby A., in consideration of a certain sum of money to be paid as therein mentioned, covenanted with the plaintiffs that he would, on the execution thereof, commence, and, within three months from the date of the deed, finish in a workmanlike manner, a gas-holder tank for the

plaintiffs,—with a penalty for default; and the defendants, as sureties for A., covenanted for the due performance by A. of all the covenants, &c., in the deed contained on the part of A., which should be subsisting and not annulled or avoided, and that they would, in case of default, pay the plaintiffs such sum as and for liquidated damages as J. E., the plaintiff's engineer, *should in his opinion adjudge to be reasonable and proper to be paid for such default*, not exceeding 300*l.* The declaration alleged a default by A., and that the said J. E. had in his opinion adjudged 300*l.* to be reasonable and proper to be paid to the plaintiffs as and for liquidated damages for A.'s default.

The defendants further pleaded,—that, before the adjudication of J. E., the defendants and A. gave him notice that they respectively revoked any submission or reference to arbitration contained in the deed:—Held, bad; the adjudication by J. E. being a mere appraisalment, and not an award. *The Northampton Gas-Light Company v. Parnell*, 630.

2. *By Bankrupt.*—It is competent to a bankrupt, if he will, to become party to a reference concerning a matter which has passed to his assignees; and, if the bankrupt be ordered by the arbitrator to pay costs, the court will enforce the payment by rule under the 1 & 2 Vict. c. 110, s. 18. *In re Milnes and Robertson*, 451.

II. Execution of Award.

1. A cause and a Chancery suit to which A. and B. were parties were by an order of nisi prius referred to an arbitrator. C., who was a party to the Chancery suit, but not a party to the action (which arose out of it), refused

to become a party to the reference:—Held, that his refusal was no ground for allowing A. to rescind the order of reference. *Wilson v. Morrell*, 720.

2. Where a matter is referred to the award of three arbitrators, or any two of them, the two who execute the award must do so at the same time and place, and in the presence of each other,—otherwise it is not what the parties stipulated for, viz. the joint judgment of the two. *Peterson v. Ayre*, 724.

III. Certainty and Finality of Award.

1. An action of ejectment in which there were two several demises by A. and B., was referred,—with power to the arbitrator, “in the event of his finding for the lessors of the plaintiff,” to order immediate possession to be given of the land and premises in question in the action to the lessor of the plaintiff A., and also how and in what manner such possession should be given, and, if not given, how it should be taken, and who should be at the expense thereof.

The arbitrator made his award as follows:—“I do award in favour of *the lessors of the plaintiff*, and do order that immediate possession be given of the land and premises in question in this action to the lessor of the plaintiff A., and that the defendant do consequently, and at his own proper cost and expense, pull or take down the wall or brick-work forming a gable-end of a long room, and which said wall or brick-work he has erected upon the land and premises of the said lessors, or so much of the said wall or brick-work as now stands four inches and a half, or thereabouts, over and upon the land and premises of the said lessors,

and upon a certain wall or fence which divides the property of the said lessors from that of the defendant: And I do further award, that, should the defendant refuse to pull or take down the said wall or brick-work the subject of this action and reference, that the said lessors shall, by themselves or servants, have full power to pull or take down the said wall or brick-work in question, or so much thereof as aforesaid, and, if necessary for such purpose, to enter in and upon the premises of the said defendant, and that he shall pay and be answerable for all expense incurred in their so doing:—

Held, that the award was not bad, for deciding “in favour of the lessors of the plaintiff;” and that it was sufficiently certain in the direction as to how and in what manner, and at whose expense, possession was to be given or taken. *Mays v. Cannell*, 107.

2. A cause and all matters in difference between the plaintiff and the defendants were by an order of nisi prius and a subsequent rule of court, referred to an arbitrator, the costs of the cause to abide the event, and those of the reference and award to be in the discretion of the arbitrator, who was to be at liberty to make two several awards at different times, by the first of which he was to raise questions of law for the opinion of the court; and it was by the rule of court ordered “that neither party should enforce payment of anything which might be found due by the arbitrator, under the first award, until the arbitrator should have made his final award.”

The arbitrator stated a case for the opinion of the court; and, in the result, the plaintiff became entitled to

2272l. 2s. damages. The defendants afterwards obtained an act of parliament for regulating their affairs, and under that act the plaintiff received an allotment of shares in lieu of the damages so awarded to him. It having become unnecessary and impracticable to proceed further with the reference, no second award was ever made. The plaintiff, however, signed judgment, and issued an execution against the defendants thereon, *for the costs of the action*:—

The court set aside the judgment, with costs,—holding, that, in the absence of a *final* award, the plaintiff was by the rule of court precluded from enforcing his remedy for such costs. *Wood v. The Copper Miners Company*, 464.

IV. *Expenses of Witnesses*.—See COSTS, I. 2, 3.

V. *Expenses of Award*.

1. As to the right of a lay arbitrator to avail himself of, and to charge for, professional assistance in preparing his award,—*quære?* *Galloway v. Keyworth*, 228.

2. At all events, the charge must be reasonable. *Ib.*

3. Where a lay arbitrator charged fifty guineas for four meetings, the master declined, on taxation as between party and party, to allow anything in addition (except the stamp-duty) for the charges of an attorney for preparing the award:—A rule to review refused. *Ib.*

ARCHITECT.

See CONTRACT, I. 2.

ASSURANCE.

See INSURANCE.

ATTORNEY.

Bill of Costs.

1. *Delivery of.*—An attorney, being consulted by a client who was under a charge of criminally assaulting a female child of tender years, obtained from the client a sum of 200*l.*, to do the best he could do for him, but with an understanding that no account of the transaction should be kept or rendered. Having succeeded in procuring the prisoner's discharge, the attorney was called upon after the lapse of nearly six years to deliver a bill:—The court refused to order him to do so; but referred the whole matter to the master, who in the result discharged the rule, but without costs. *In re Edward Vann*, 341.

2. *Taxation.*—An order for the taxation and payment of an attorney's bill (after a previous order to change the attorney) cannot be made upon an ex parte application. *Gillow v. Rider*, 729.

3. *For Business done in a County-Court.*—The 15 & 16 Vict. c. 54, s. 1, provides that a scale of costs and charges to be paid to attorneys in the county-courts shall be prepared, and submitted for the approval of certain of the judges, and that, "from and after a day to be named by such judges," the scale so allowed shall be in force in every county-court. The act then goes on to provide, that "all costs shall be taxed by the clerk of the court;" and that "no attorney shall have a right to recover at law from his client any costs or charges not so allowed on taxation." Business was done by an attorney in a county-court, and an action brought in respect thereof, before the allowance of any scale of costs under the above act:—Held, that he

was not precluded from recovering his costs. *Leverson v. Shaw*, 282.

ATTORNMENT.

See EJECTMENT, I. 2.

AUTHORITY.

Revocation by Death.—*See* EXECUTORS AND ADMINISTRATORS.

AWARD.

See ARBITRAMENT.

BAD DEBTS.

See INSURANCE, 4, 5.

BAILIFF.

Fees of.—*See* COUNTY-COURT, III.

BANKRUPT.

I. *Trading.*

Cowkeeper.—A case stated by an arbitrator for the opinion of the court, found, that A., a farmer, who was under covenant with his landlord to "consume the whole of the turnips and other roots upon the premises;" that part of the stock kept by A. upon the farm consisted of cows; that his intention in keeping them was to sell a considerable quantity of the milk obtained from them, which he did by daily sending a man to sell and deliver it at a neighbouring town to customers some of whom were regular and others chance customers; that he sometimes made butter from the surplus milk, and sold it in like manner; that keeping cows to the extent A. did, was a good, proper, and husbandlike, as well as a profitable way of managing the farm as he did; and that cows were the most profitable stock he could keep:—Held, that A.

was not a cow-keeper within the bankrupt act, 12 & 13 Vict. c. 106, s. 65. *Bell v. Young*, 524.

II. *Submission to Arbitration by.*

It is competent to a bankrupt, if he will, to become a party to a reference concerning a matter which has passed to his assignees; and, if the bankrupt be ordered by the arbitrator to pay costs, the court will enforce the payment by rule under the 1 & 2 Vict. c. 110, s. 18. *In Re Milnes and Robertson*, 451.

BARON AND FEME.

See HUSBAND AND WIFE.

BILL OF EXCHANGE.

What amounts to Payment.

The word "retire" in reference to a bill of exchange, is susceptible of various meanings, according as it is applied to various circumstances: if the acceptor retires the bill at maturity, he takes it entirely from circulation, and it is in effect paid; but, if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold it with the same remedies as he would have had if he had been called upon in due course, and had paid the amount to his immediate indorsee; and this latter is the ordinary meaning of the word "retire." *Elsam v. Denny*, 87.

BILL OF LADING.

See SHIP AND SHIPPING, I.

BURIAL-GROUND.

Rate.

A rate may be made, under the provisions of the 56 G. 3, c. 45, ss. 59, 60, for the purpose of paying the principal

and interest of money borrowed in the manner provided by that act, at a meeting of which the notice required by the 25th section of the 59 G. 3, c. 134, has not been given,—the latter statute not repealing the former, but merely providing a further mode of raising the necessary funds. *Farnell v. Smith*, 572.

CANAL TRAFFIC.

See REGULE GENERALIS, 473—476.

CANCELLATION.

See INSURANCE, 4, 5.

CASE.

I. *For false Representation.*

1. The declaration in an action for giving a false character to one P., a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he had dismissed P. from his employ, was, the decrease in his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty.

It appeared at the trial, that P. had been guilty of dishonesty while in the defendant's employ, but that the defendant had not mentioned that fact to the plaintiff when he recommended him to try P. It further appeared, however, that P. had not been dismissed from the defendant's employ on account of his dishonesty, but really for the reason which the defendant had assigned to the plaintiff:—

Held, that this evidence did not support the declaration. *Wilkin v. Reed*, 192.

2. The first count of the declaration alleged that the plaintiff was the first and true inventor of "improvements in the manufacture of fire-arms, also of cartridges, of priming, and of wads or wadding for fire-arms," and had petitioned for a patent; that his petition had been referred to the solicitor-general; that the solicitor-general had required and allowed the title of the said invention to be amended, as an invention for "improvements in the manufacture of cartridges and of wads or wadding for fire-arms," and given a certificate of allowance; and that the defendant, well knowing the premises, but maliciously intending to injure the plaintiff, and to prevent him from obtaining letters-patent for his said invention, falsely, fraudulently, maliciously, and wrongfully, and without any reasonable or probable cause, represented to the solicitor-general that he had an interest in opposing a grant of letters-patent to the plaintiff, and gave notice that he had applied for a patent and obtained provisional protection for an invention for "improvements in cartridges," and that, in consequence of the alteration in the title of the plaintiff's patent, he had reason to apprehend that such alteration in the title might admit of his invention being embraced in the plaintiff's patent; whereas, in truth, the alleged invention for which the defendant had obtained provisional protection was not his invention, but a fraudulent imitation of the plaintiff's invention, and the defendant had no interest in opposing a grant of letters-patent to the plaintiff.

There was a second count alleging that the defendant's knowledge of the plaintiff's invention was derived from

a confidential communication thereof from the plaintiff, and that the defendant was seeking a patent in breach of such confidence: and the declaration concluded with a general allegation of special damage, that, by means of the premises, the solicitor-general refused to allow the plaintiff's application for letters-patent to proceed, and the plaintiff was thereby prevented from obtaining and failed to obtain a patent for his said invention, and was put to expense in opposing a grant of letters-patent to the defendant, &c. :—

Held, that the special damage alleged did not naturally flow from the grievances charged in the first count, and that without it the count disclosed no cause of action. *Haddan v. Lott*, 411.

II. *For Seduction of Plaintiff's Daughter.*

A. agreed with B. to permit his (B.'s) daughter (who was then residing with him as part of his family) to enter his (A.'s) service, to assist in his business during a temporary absence of his wife:—Held, that B. might maintain an action for her seduction by A. during that period. *Griffiths v. Teetgen*, 344.

CAUSE OF ACTION.

See COUNTY-COURT, I.

CHARTERPARTY.

Construction of.

1. By a charterparty for a voyage from Sundswall to Southampton, it was stipulated that the owner should receive "the highest freight which *he could prove* to have been paid for ships on the same voyage when the vessel passed Elsinore, but not less than 90s. per St. Petersburg standard hundred:"

—Held, that this did not contemplate strictly *legal* proof; but that the owner would be entitled to the highest rate of freight which the master, to the knowledge of the freighter, was in a position to prove, by reasonable evidence, to have been paid. *Gether v. Capper*, 39.

2. By a charterparty for a voyage from Sundswall to *Southampton*, it was stipulated that the owner should receive "the highest freight which he could prove [or 'prove by evidence'] to have been paid for ships on the *same* voyage or passage by water when the vessel passed *Elsinore*, but not less than 90s. per St. Petersburg standard hundred:"—Held, that the charterparty did not contemplate strict *legal* proof of the actual *payment* of the higher rate of freight, but reasonable evidence that such higher freight had been paid or *contracted to be paid*: and (dubitante Jervis, C. J.) that the owner could not entitle himself to a higher rate of freight than the 90s., by proving that other vessels had been chartered at such higher rate for a voyage to *London*,—that not being, within the fair intendment of the charterparty, the *same* voyage. *Gether v. Capper*, 696.

And see PLEADING, VI.

CIRCUITY OF ACTION.

Plea in Avoidance of,—See PLEADING, VI.

CODICIL.

See DEVISE.

COMMISSION.

For taking the Acknowledgment of a married Woman. Enlarging Return,—See HUSBAND AND WIFE.

COMMON LAW PROCEDURE ACT, 1852.

Construction of.

- s. 11,—See PRACTICE, II, 4.
- ss. 55, 56,—See PLEADING, IX.
- s. 17,—See PRACTICE, I.
- s. 138,—See PRACTICE, III, 2.
- s. 170,—See EJECTMENT.
- s. 222,—See AMENDMENT.

COMMON LAW PROCEDURE ACT, 1854.

Construction of.

- ss. 34, 35,—See APPEAL, I.
- s. 45,—See AFFIDAVIT, IV.
- s. 82,—See LETTERS-PATENT.

COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

See JOINT-STOCK COMPANY, 2.

CONDITION PRECEDENT.

The plaintiffs declared against the defendants, as sureties, upon a deed, dated the 30th of March, 1853, between A., of the first part, the plaintiffs (a corporation) of the second part, and the defendants of the third part, whereby A., in consideration of a certain sum of money to be paid as therein mentioned, covenanted with the plaintiffs that he would, *on the execution thereof*, commence, and, *within three months from the date of the deed*, finish in a workmanlike manner, a gas-holder tank for the plaintiffs,—with a penalty for default; and the defendants, as sureties for A., covenanted for the due performance by A. of all the covenants, &c., in the deed contained on the part of A., which should be subsisting and not annulled or avoided, and that they would, in case of default, pay the plaintiffs such sum as and for liquidated

damages as J. E., the plaintiffs' engineer, *should in his opinion adjudge to be reasonable and proper to be paid for such default*, not exceeding 300*l.* The declaration alleged a default by A., and that the said J. E. had in his opinion adjudged 300*l.* to be reasonable and proper to be paid to the plaintiffs as and for liquidated damages for A.'s default.

The defendants pleaded,—that the plaintiffs did not execute the deed until after the expiration of three months from the date thereof:—Held, bad, inasmuch as the execution of the deed by them was not a condition precedent to their right to sue for a breach of any covenant therein contained; and that the circumstance of their being a corporation made no difference in this respect. *The Northampton Gas-Light Company v. Parnell*, 630.

CONDITIONAL CONTRACT.

See CONTRACT, III.

CONSIDERATION.

See PLEADING, II.

CONTRACT.

I. Construction of.

1. A. contracted to sell to B. 100 hhds. of Gingelly oil "expected to arrive by the ship *Resolute* from Madras." The *Resolute* arrived with 100 hhds. of Gingelly oil on board, but it turned out that 34 hhds. only were consigned to or under the power or control of A.:—

Semble, that this did not excuse A. for the non-performance of his contract, and that it would not be performed by a delivery or tender of the 34 hhds. over which he *had* control. *Fischel v. Scott*, 69.

2. The declaration stated, that A.,

being possessed of certain land, and the plaintiff being an architect and surveyor, it was agreed between them that the plaintiff should lay out the said land for building purposes, viz. that he should make all the necessary surveys, plans, &c., and that the plaintiff undertook the whole of the above on the following conditions,—*that he make A. no charge whatever for the above services*, but that, *in the event of any of the land being disposed of for building purposes*, the plaintiff should be appointed the architect on A.'s behalf to see that the construction of the works was substantial, &c., and that parties building on the land should pay the plaintiff 1½ per cent. on the outlay, providing they did not employ the plaintiff as their architect; but that, *in the event of A. or his executors wishing to dispense with the plaintiff's services at any time*, he or they should be at liberty to do so, *with the understanding that he or they remunerate the plaintiff for the time, trouble, and expenses he had been put to in making the said preparations*. It then averred that the plaintiff made the necessary surveys, plans, &c., and incurred expenses therein; and that the said land was not, nor was any part thereof, disposed of for building purposes according to the said agreement, although a reasonable time for such disposal of the same had elapsed; and that, after the death of A., the defendants, as his executors, dispensed with the further services of the plaintiff in respect of the said contract, and wholly released and discharged him from any further performance of the same, and hindered and prevented themselves from disposing, and put it out of their power to dispose of the said land, or any

part of it, for building purposes; and that thereupon there became and was due and payable to the plaintiff from the defendants, as executors, a large sum for his trouble in preparing the survey, plans, &c.

Held, that the declaration shewed no cause of action, inasmuch as the event on the happening of which alone the plaintiff was to be entitled to remuneration for his services, viz. *the disposal of the land for building purposes*, had not happened. *Moffatt v. Laurie*, 583.

And see EXECUTORS AND ADMINISTRATORS.

II. Repudiation of

The vendee of goods who has used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract, and recover back the price. *Harnor v. Groves*, 667.

III. Written Contract varied by Matter not in Writing.

Where a plaintiff declares upon an agreement in writing, the defendant cannot in pleading rely upon oral matter introducing a qualification of the contract declared on, or shewing that it was made subject to conditions which do not appear upon the face of it. *Canham v. Barry*, 597.

And see WARRANTY, II.

CONVERSION.

See TROVER.

CORPORATION.

See CONDITION PRECEDENT.

COSTS.

I. Taxation of.

1. Order for.]—An order for the

taxation and payment of an attorney's bill (after a previous order to change the attorney) cannot be made upon an ex parte application. *Gillow v. Rider*, 729.

2. *Expenses of Witnesses.*]—Where a witness is rejected at nisi prius, and the ruling of the judge is acquiesced in by the parties, or upheld by the court, the expenses of his attendance are not allowed on taxation as between party and party. *Galloway v. Keyworth*, 228.

So, where the witness is rejected by an arbitrator, whether upon a sufficient or an insufficient ground. *Ib.*

3. *Scientific Witnesses.*]—A cause was called on at the assizes, and referred to a lay arbitrator. On the hearing before him, a scientific witness was tendered on the part of the plaintiff, and rejected by the arbitrator, on the ground that, being himself a scientific man, he did not need the witness's assistance:—Held, that the master, on taxation as between party and party, properly disallowed the expense of the witness's attendance as well at the assizes as before the arbitrator. *Ib.*

II. Where Money paid into Court.

The plaintiff brought an action for 12*l.* 5*s.* 7½*d.*, for goods sold and delivered. The defendant paid 10*l.* on account, and before declaration took out a summons calling on the plaintiff to shew cause why the proceedings should not be stayed on payment of the further sum of 6*s.* 4½*d.* and costs. The plaintiff claiming more, no order was made. A declaration was afterwards delivered, and the defendant paid 7*s.* into court, which the plaintiff accepted:—Held,—dissentiente Cresswell, J.,—that the plaintiff's accept-

ance of 7s., after his refusal of 6s. 4½d., did not disentitle him to the costs incurred subsequently to the order. *Shaw v. Hughes*, 660.

III. Security for Costs.

Where a plaintiff is insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs. *Goatley v. Emmott*, 291.

IV. Of Proceedings under the 8 & 9 Vict. c. 18, s. 68.

In an action under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, to recover compensation in respect of lands "damaged or injuriously affected" by the execution of the works of a railway company, the declaration stated that the plaintiff claimed 1000l., that the company had notice of his claim, and offered him 60l., and that a jury impannelled pursuant to the provisions of the act awarded him 215l. :—Held, by the Exchequer Chamber, affirming the judgment of the court below, that the plaintiff was entitled to the costs of the inquiry before the sheriff,—the 51st section, which provides for such costs, being virtually incorporated in the 68th. *The South-Eastern Railway Company v. Richardson*, 810.

COUNTY-COURT.

I. Jurisdiction of.

A., carrying on business in Manchester, by his traveller sold goods to B. at Oxford, which goods were to be forwarded in the usual way, viz. by the London and North Western Railway. The goods were accordingly packed and sent by A. to the railway-

station at Manchester, addressed to B. at Oxford :—Held, that, as the order for the goods was received at Oxford, the "whole cause of action did not arise in Manchester, so as to give the county-court there jurisdiction to try it, under the 9 & 10 Vict. c. 95, s. 60. *Borthwick, App., Walton, Resp.*, 501.

II. Costs in.

The 15 & 16 Vict. c. 54, s. 1, provides that a scale of costs and charges to be paid to attorneys in the county-courts, shall be prepared, and submitted for the approval of certain of the judges, and that, "from and after a day to be named by such judges," the scale so allowed shall be in force in every county-court. The act then goes on to provide, that "all costs shall be taxed by the clerk of the court;" and that "no attorney shall have a right to recover at law from his client any costs or charges not so allowed on taxation." Business was done by an attorney in a county-court, and an action brought in respect thereof, before the allowance of any scale of costs under the above act :—Held, that he was not precluded from recovering his costs. *Levenson v. Shaw*, 282.

III. Bailiff's Fees.

1. A. obtained judgment against B. in a county-court, and issued execution. C. claiming the goods, the high-bailiff took out an interpleader summons, and ultimately C.'s claim was disallowed, and C. was ordered to pay the costs of the interpleader proceedings. The high-bailiff paid the amount of the levy into court, deducting the fees and expenses incident to the levy, but not the costs of the interpleader, and the balance was paid out of court

to A.:—Held, that the high-bailiff could not maintain *an action* against A. for the interpleader costs. *Bloor v. Huston*, 266.

2. Whether he could have deducted them from the amount of the levy, under the above order,—*quære?* *Ib.*

COWKEEPER.

See *BANKRUPT*, I.

DAMAGES.

Measure of.

Upon a negotiation for the sale of a ship, B., the seller, represented to A., the buyer, that she was, so far as he knew, as sound as a ship of her age usually was. Upon the faith of this representation, A. agreed to purchase the ship, and proceeded to make alterations in her to fit her for a voyage to Australia, for which B. at the time of the contract knew she was intended. The register proving defective, A. afterwards repudiated the bargain, and, upon a suggestion that the representation of B. as to the ship's soundness was false, brought an action against him, charging him with a false and fraudulent representation with a view to induce A., and whereby A. was induced, to expend money on the ship, which but for such false and fraudulent representation he would not have done:—

Quære, whether the plaintiff could recover as damages the amount expended by him in repairing the ship. *Milne v. Marwood*, 778.

DEBTS.

See *INSURANCE*, 4, 5.

DEFAMATION.

Sufficiency of Declaration.

Innuendo.]—In slander, the declaration stated, that the plaintiff was engaged in the trade of a manufacturer of asphalte, and had been employed by the board of ordnance to relay the entrance of their office with new asphalte, and had duly performed the work; and that the defendant spoke of and concerning the plaintiff in his said trade, and of and concerning the plaintiff in reference to the said work, the false and defamatory words following:—"The old materials have been re-laid by your company in the asphalte work executed in front of the Ordnance Office; and I have seen the work done,"—innuendo, "that the plaintiff had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte materials which had before been used at the entrance of the said Ordnance Office, instead of new asphalte, according to his said contract:"—Held, that the declaration was sufficient, and the innuendo not too large. *Babonneau v. Farrell*, 360.

DEMURRER.

See *PLEADING*, IX.

DESERTED PREMISES.

See *LANDLORD AND TENANT*, IV.

DEVISE.

Construction of.

Testator by his will (made after the passing of the 7 W. 4 & 1 Vict. c. 26), devised all his real and personal estate to his "three unmarried daughters, A., B., and C.," as tenants-in-common in fee. By a codicil he declared, that,

"in case one of my daughters, A., B., and C., should get married, the two then remaining single, shall, *at the end of twelve months after my decease*, pay to the married sister the sum of 500*l.* in lieu of any further claim whatsoever on my property; and the two surviving daughters then single above named, to be sole possessors of all my property named in this my last will and testament, and to their heirs for ever:"—

Held, that the codicil contemplated the marriage of a daughter in the lifetime of the testator,—or, at all events, within twelve months after his decease. *Lloyd v. Davies*, 76.

DILAPIDATIONS.

See ECCLESIASTICAL VALUATION.

DISCONTINUANCE.

See PRACTICE, III.

DISTRESS.

See LANDLORD AND TENANT, III.

ECCLESIASTICAL VALUATION.

Valuation of Dilapidations as between outgoing and incoming Incumbent.

One who holds himself out as a valuer of ecclesiastical property, though he is *not* bound to possess a *precise and accurate knowledge of the law* respecting the valuation of dilapidations as between outgoing and incoming incumbent, *is* bound to bring to the performance of the duty he undertakes a knowledge of the general rules applicable to the subject, and of the broad distinction which exists between the cases of a valuation as between incoming and outgoing *tenant*, and a

valuation as between incoming and outgoing *incumbent*. *Jenkins v. Betham*, 168.

EJECTMENT.

I. *Service of Writ.*

1. *Quare*, whether the affidavit (required by the 112th rule of Hilary Term, 1853,) of service of the writ of ejectment under the 170th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, should shew (as under the old practice) that the nature and object of the service were *explained* to the party served. *Edwards v. Griffiths*, 397.

2. At all events, an irregularity in that respect is waived by a subsequent attornment. *Id.*

II. *Title of Plaintiff*, — *See* OUTSTANDING TERM.

And see PLEADING, V.

ERASURE.

In Affidavit, — *See* AFFIDAVIT, III.

ESTOPPEL.

Recovery in a former Action.

To a count for money had and received, the defendant pleaded, that the "said debt for money received became due from, and was contracted by, the defendant jointly with A., and not by the defendant alone, nor by the two jointly and severally, but only jointly;" that, after the accruing of the causes of action in the count mentioned, the plaintiff sued A. for money had and received and in trover, and recovered a judgment against him for 100*l.* and costs; and that the causes of action in respect of which the plaintiff so recovered that judgment against A. *is*

cluded all the causes of action to which that plea was pleaded.

It appeared in evidence that the defendant and A. had wrongfully converted the goods of the plaintiff, by selling them; that the proceeds of the sale (150*l.*) were received *by the defendant alone*; and that the plaintiff had sued A., and recovered a verdict for 100*l.*, as the value of the goods so converted; but that, in consequence of A.'s insolvency, he had obtained no satisfaction. Upon its being objected, at the trial of this action, that these facts did not sustain the plea, the judge allowed the defendant to amend by substituting for the words above in inverted commas, the following, "the said money was money received for and as being the proceeds of the sale of the goods in the last count and hereinafter mentioned:"—

Held, that the amended plea afforded a complete answer to the claim of the plaintiff in this action. *Buckland v. Johnson*, 145.

And see PLEADING, VII.

EVIDENCE.

I. *Public Books.*

A copy (unstamped) of the Act Book of the Ecclesiastical Court is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14. *Dorrett v. Meux*, 142.

II. *Parol Evidence to vary Written Contract.*

1. Where a plaintiff declares upon an agreement *in writing*, the defendant cannot in pleading rely upon *oral* matter introducing a qualification of the contract declared on, or shewing that it was made subject to conditions

which do not appear on the face of it. *Canham v. Barry*, 597.

2. In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent at the time of the sale represented the goods to be of a particular quality. *Harnor v. Groves*, 667.

III. *Expenses of Witnesses.*—*See COSTS, I.*

EXECUTION.

I. *Year's Rent under 8 Anne, c. 14.*—*See LANDLORD AND TENANT, III.*

II. *Against Shareholders.*—*See JOINT-STOCK COMPANY.*

III. *Setting aside.*—*See ARBITRAMENT, III., 2.*

IV. *Discharge from, under 7 & 8 Vict. c. 96, s. 25.*—*See PRISONER.*

EXECUTORS AND ADMINISTRATORS.

Confirmation or Adoption of a Contract of the Testator.

A. agreed with B., that he would endeavour to sell a picture belonging to B., and that, if he succeeded in selling the same, B. should pay him 100*l.* B. died before the picture was sold.

In an action against the administratrix of B. upon the above agreement, the count alleged, that, in pursuance of the agreement, A. did, before and after the death of B., endeavour to sell, and after the death of B. he did, in consequence of such endeavours, succeed in selling the picture, "which sale was confirmed by the defendant as administratrix as aforesaid;" and that she refused to pay the 100*l.*: Held, that

the count disclosed no cause of action, inasmuch as the authority from B. to A. to sell the picture, was revoked by B.'s death, and the defendant's confirmation of the *sale*, in the absence of an allegation that she was aware of the existence of the contract between A. and B., was no adoption of the *contract* by her, so as to make her liable to pay the 100*l*. *Campanari v. Woodburn*, 400.

And see Bengé v. Swaine, 784.

FALSE REPRESENTATION.

See CASE, I.

FARMING LEASE.

See LANDLORD AND TENANT, V.

FAVERSHAM OYSTER-FISHERY.

See OYSTER-FISHERY.

FORBEARANCE.

See PLEADING, II.

FORMER RECOVERY.

See ESTOPPEL.

FRAUD.

Contract procured by.

1. A. procured B. to grant him a lease of premises by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, A. converted the premises into a common brothel, whereupon B. forcibly expelled him:—Held, that A. might maintain ejectment,—the fraudulent misrepresentation, and the subsequent illegal use of the premises, not being sufficient

(at law) to avoid the lease. *Feret v. Hill*, 207.

2. To a count upon an agreement whereby the defendant agreed upon certain terms to sell to the plaintiff "all his unexpired term and leasehold interest in a farm then in his occupation," with immediate possession,—the defendant pleaded, that he held the farm under a lease containing a covenant not to assign without the consent in writing of the lessors; that, being desirous to part with the farm, he applied to the agent of the lessors for their consent to his doing so, and had obtained an assurance, that, if he found an eligible tenant, who could give satisfactory references, the consent would not be withheld; that the agreement was made for the purpose of one Main becoming the occupier of the farm; and that the defendant was induced by the plaintiff to enter into the agreement, and did so, upon the faith and assurance, as the plaintiff knew, and the plaintiff, in order to induce the defendant to enter into the agreement, represented, and induced the defendant to believe, that Main was a person of respectability, and eligible as tenant of the farm, and could give references that would be satisfactory to the landlords; whereas, in truth, he was not a person of respectability, and could not and did not give such references:—Held, a good plea, inasmuch as it shewed that the defendant was induced to enter into the contract by a false representation of the plaintiff as to a fact within his knowledge, and which was material to the subject-matter of the contract. *Canham v. Barry*, 597.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREIGHT.

See CHARTERPARTY.

GAMING.

*Wagering Contract within 8 & 9 Vict.
c. 109, s. 18.*

1. It is no answer to an action for money paid by the plaintiff for the defendant's use, at his request, that the money was paid in respect of losses on wagering contracts made void by the statute 8 & 9 Vict. c. 109, s. 18. *Knight v. Cambers*, 562.

2. To an action for "stock, shares, scrip, goods, and chattels bargained and sold and sold and delivered by the plaintiff to the defendant, and for work and labour and materials and for commission due and payable in respect thereof, and for money paid by the plaintiff for the defendant at his request, and for money due on accounts stated,"—the defendant pleaded,—as to so much of the claim as related to money payable by the defendant to the plaintiff for the said work and materials and commission, and for money paid by the plaintiff, and for money due from the defendant upon the said accounts stated,—that the plaintiff was a stock and share-broker, and that the defendant employed him as such broker, after the passing and coming into operation of the said act of parliament (referring to the 8 & 9 Vict. c. 109, mentioned in a former plea), to enter into, and the plaintiff accordingly entered into, on his behalf, certain contracts by way of gaming and wagering, "contrary to the form of the statute," that is to say, certain wagering contracts, under the semblance of pretended sales, re-

specting the market price and value of certain public and other stock, shares, scrip, and goods, and chattels, on certain days then to come, whereby, under pretence of contracts, the plaintiff agreed with divers persons whose names were to the defendant unknown, that, if the price and value of the said public stock and shares, scrip, goods, and chattels, should be lower, &c., and vice versâ, "differences" should be paid. The plea then went on to allege, that no real sale was intended, and that the plaintiff knew it; and that the work and labour in the declaration mentioned was done, and the commission claimed, in respect of the making of the said wagers and contracts in the plea mentioned; and that the money paid by the plaintiff was paid by him as such broker in settling such differences:—

Held, that the plea was no answer to the action. *Knight v. Fitch*, 566.

3. *Semble*, that it was substantially a plea founded on the 8 & 9 Vict. c. 109, s. 18: but that, if it was to be treated as a plea founded on the stock-jobbing act, 7 G. 2, c. 8, it should have shewn that each of the contracts mentioned therein involved a dealing in public stock. *Ib.*

HABEAS CORPUS.

See LUNATIC, II.

HIGH-BAILIFF.

Of County-Court,—See COUNTY-COURT, III.

HORSE.

Warranty on Sale of,—See WARRANTY, I.

HUSBAND AND WIFE.

Acknowledgment by Married Woman.

1. *Blanks.*]—The court allowed a commission for taking the acknowledgment of a married woman in Australia under the 3 & 4 W. 4, c. 74, s. 83, to go out with a blank for the Christian name of the husband, which (the marriage having taken place there) was unknown here. *In re Legge*, 364.

2. *Erasure in Affidavit.*]—The court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. *In re Mary Bingle*, 449.

The jurat of an affidavit of the due taking of an acknowledgment at Sydney had an interlineation in the body of it, and an erasure in the jurat:—The court refused to allow it to be filed. *In re Tierney*, 761.

3. *Certified Copy of Affidavit made Abroad.*]—Where an acknowledgment of a married woman, under the 3 & 4 W. 4, c. 74, was taken at Milan, the court allowed a certified copy of an act of the Imperial Royal Civil Tribunal of that city to be received in lieu of the affidavit verifying the certificate of the commissioners,—upon the production of an affidavit from a competent party shewing that by the law of that country depositions on oath are always deposited amongst the records of the court, and office or certified copies only delivered out to the parties. *In re Marianne Clericetti*, 762.

4. *Irregularity in the taking of.*]—An

acknowledgment of a deed by a married woman under the 3 & 4 W. 4, c. 74, was taken in the year 1842, and the certificate and memorandum thereof duly signed by the commissioners; but, by some inadvertence on the part of the solicitor employed in the transaction, there was no affidavit of verification by the commissioners, and the documents were not filed:—

After the lapse of thirteen years, the court allowed the certificate to be received and filed, upon an affidavit by the surviving commissioner, stating that it had always been his practice, and, as he believed, that of his co-commissioner, to make all requisite inquiries of the married woman before taking the acknowledgment, and that, from the circumstance of his having signed the certificate and memorandum, he verily believed that all proper inquiries had been made on this occasion, though, from the lapse of time, he was unable positively to state what the answers were. *In re Barbara Warne*, 767.

5. *Notarial Certificate.*]—The court dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu, under the 3 & 4 W. 4, c. 74,—it being sworn that there was no English notary in the island. *In re Elizabeth Hurst*, 410.

6. *Enlarging the Time for returning the Commission.*]—The court refused to enlarge the time for returning a commission for taking the acknowledgment of a deed by a married woman at Sydney, in order to get defects in the affidavit of verification amended,—the time for the return having expired. *In re Tierney*, 761.

And see *In re Ollerton*, 796.

IMPROVED VALUE.
See LANDLORD AND TENANT, I.

INCLOSURE ACT.

Construction of.

By an inclosure-act, reciting that the defendant was lord of the manors of A. and B., it was enacted that nothing therein contained should be construed to defeat or prejudice his rights as such lord, but that the lord, his heirs and assigns, should hold and enjoy all manorial rights, and also all mines, minerals, and quarries, &c., belonging to the said manors, in as full and ample a manner as if the act had not been made; "and also full and free liberty at all times hereafter of making, &c., and of granting to any other person or persons, any waggon-ways or other ways in, over, or along the commons or waste land (intended to be allotted and inclosed), and to do every other act now in use, or which shall hereafter be used or invented, which shall be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the said last-mentioned commons, &c.; and also for the leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever :"—

Held, that the words "produce of any other mines and minerals" did not mean the produce of mines and minerals *other than coals*, but the produce of mines and minerals other than the "mines, minerals, and quarries" before mentioned; and, consequently, that the defendant had a right to use a railway constructed by him under the power so given to him, for the purpose

of carrying *coke*, such coke not being made from coal worked out of the waste which was the subject of the inclosure. *Bowes v. Lord Ravensworth*, 512

[A writ of error is now pending.]

INDEMNITY.

See INSURANCE.

INFRINGEMENTS.

Particulars of,—See LETTERS-PATENT, II.

INJUNCTION.

See LETTERS-PATENT, I.

INNUENDO.

See DEFAMATION.

INSOLVENT.

Security for Costs,—See COSTS, III.
And see PRISONER.

INSURANCE.

Contract of.

1. The contract of life-assurance is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of certain annual premiums during his life. It is not a contract of *indemnity*. *Dalby v. The India and London Life Assurance Company*, 365.

2. Where a policy effected by a creditor on the life of his debtor, is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death does not invalidate it, by reason of the provisions of the 14 G. 3, c. 48. *Ib.*

3. *Godsall v. Boldero*, 9 East, 72, overruled. *Ib.*

4. The rules of a society established

for the mutual assurance of traders against bad debts, after stipulating for the payment of premiums, provided, amongst other things, that, "if the premiums on any policy should not be paid within fifteen days after the same should fall due, the directors might, with the approbation of the council, either declare such policy void, or enforce the payment of such premiums."

In a declaration on a policy, the plaintiffs averred that they had done all things necessary on their part, and had been ready and willing to do all things according to the said policy, rules, and regulations, which it was necessary that they should be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle them to be paid by the society the loss therein-after mentioned, and that a reasonable time for payment thereof had elapsed. It then went on to aver that a loss had been incurred, and that the defendants refused to pay:—Held, that this general averment was sufficient, without shewing the various steps required by the rules of the society to entitle the assured to recover a loss. *Bamberger v. The Commercial Credit Mutual Assurance Society*, 676.

5. The defendants pleaded, that, after the making of the policy, and more than fifteen days before the commencement of the suit, a certain premium became payable by the plaintiffs and was not duly paid, whereupon the directors of the society, with the approbation of the council, cancelled the policy, and declared the same void, whereof the plaintiffs had notice:—Held, that the plea disclosed a sufficient answer to the plaintiffs' claim. *Ib.*

INTERPLEADER.

In the County-Court,—See COUNTY-COURT, III.

IRREGULARITY.

See PRACTICE, IV.

JOINT-STOCK COMPANY.

Execution against a Shareholder.

1. The 66th section of the 7 & 8 Vict. c. 110, enables a creditor to enforce a judgment obtained against a joint-stock company *completely registered*, by execution against shareholders.

The 50th section of the winding-up act, 11 & 12 Vict. c. 45, provides, that, after the appointment of an official manager under that act, all actions brought *against the company or any person duly authorized to be sued as nominal plaintiff on behalf of the company*, shall be brought against the official manager.

And the 12 & 13 Vict. c. 108, s. 1, extends the provisions of the last-mentioned act to all partnerships consisting of more than seven members:—

Held, that a judgment obtained against the official manager can only be enforced against a shareholder, where the action is one which could be brought against the company as a company, or against some person authorised to be sued on their behalf; and, consequently, that the provisions of the winding-up acts do not apply to the case of an action against a non-registered company. *Pritchard v. The London and Birmingham Extension, Northampton, Daventry, Leamington,*

and *Warwick Railway Company*,—*In re Weiss*, 331.

2. To entitle a judgment-creditor of a railway company to a *scire facias* against a shareholder, under the 8 & 9 Vict. c. 16, s. 36 (the Companies Clauses Consolidation Act, 1845), it is not enough to shew that a *fi. fa.* has been issued against the company, and returned *nulla bona*: the affidavit must go on to allege circumstances to satisfy the court that due diligence has been used by the plaintiff to discover property of the company out of which he might obtain satisfaction of the judgment. *Hitchins v. The Kilkenny and Great Southern and Western Railway Company*, 459.

JUDGE'S ORDER.

For Leave to Discontinue.

The plaintiff having obtained a judge's order to discontinue "on payment of costs," and having acted upon the order, by attending the taxation under it,—the court refused to allow him to abandon it. *Benge v. Swaine*, 784.

JUDGMENT.

In Trover, Effect of.

Semble, per Jervis, C. J.,—that a judgment in *trover* vests the property in the goods in the defendant, *from the time of the conversion*. *Buckland v. Johnson*, 145.

LAND-TAX.

See LANDLORD AND TENANT, I.

LANDLORD AND TENANT.

I. Land-tax and Sewers-rate.

A. demised land to B. upon a building lease, at the yearly rent of 60*l.*,

clear of all rates, assessments, &c., the sewers-rate, land-tax, and landlord's property or income-tax only excepted, with the usual covenants for the payment of rent, &c. B. having by building on the land increased its rateable value to 300*l.* per annum:—Held, that he was only entitled to deduct the sewers-rate and land-tax upon the original rent, and not in respect of the improved value. *Smith v. Humble*, 321.

II. Use and Occupation.

A. entered into an agreement (*in writing*) with B. to take certain premises, at a certain yearly rent,—the premises to be put into repair by B. and the rent not to be payable until the repairs were completed. A., by his tenant, occupied the premises for six months, and then quitted, the stipulated repairs not having been done:—Held, that B. was entitled to maintain an action for use and occupation, as upon an *implied* agreement to pay so much as the occupation might be reasonably worth. *Smith v. Eldridge*, 236.

III. Year's Rent under 8 Anne, c. 14.

A landlord, having distrained for rent, was *induced* to withdraw the distress, by the tenant's assurance (which was false) that a particular debt had been satisfied. The creditor having proceeded to judgment and execution, the tenant's goods were seized by the sheriff:—Held, that the landlord was entitled to a year's rent, under the statute 8 Anne, c. 14. *Wollaston, App., Stafford, Resp.*, 278.

IV. Deserted Premises.

The power to view and give possession to the landlord of deserted pre-

mises, created by the 11 G. 2, c. 19, s. 16,—extended by the 57 G. 3, c. 52, and varied as to its mode of execution by the 3 & 4 Vict. c. 84, s. 13,—is not, by any of the provisions of the last-mentioned statute, or by the 11 & 12 Vict. c. 43, s. 34, vested in the Lord Mayor or one Alderman sitting in the justice-rooms at the Mansion-House or Guildhall, so as to enable them to exercise the power in the same manner as a "police magistrate" sitting in one of the metropolitan police-courts may, under the 3 & 4 Vict. c. 84, s. 13, exercise it. *Edwards v. Hodges*, 477.

V. Valuation on Expiration of Tenancy of a Farm.

1. A. held a farm of B., subject, amongst others, to the following covenants contained in a draft lease under which a former tenant had held,—1. to house the produce on the farm, and to thresh, feed, and fodder the same thereon, and not to sell or dispose of any part thereof, *except as after mentioned*,—2. that A. should be at liberty to sell hay and wheat straw (except that of the last year's produce), bringing back for every load of hay or straw two loads of manure,—3. that A. should, on the determination of the tenancy, leave all the hay, straw, and manure arising during the last year of his tenancy for the use of B. or of the incoming tenant, being paid for the hay and wheat straw at a *fair valuation*,—these latter words "fair valuation" having been substituted in the draft lease for "consuming price."

In an action by A. against B. to recover the value of hay and wheat straw left by the former at the expiration of his tenancy, it appeared that a valuation had been made by an um-

pire, who was the only witness called at the trial, and who stated that he had valued, not at a "consuming price," nor a "market price," but at a "fair valuation;" and the jury returned a verdict in accordance with his valuation:—

Held, that there was nothing from which the court could see that the valuation had been made upon an erroneous principle; and, what was a "fair valuation," being a question for the jury, there was no ground for interfering with the verdict. *Cumberland v. Bowes*, 348.

2. Whether the court could properly notice the substitution of the words "fair valuation" for "consuming price," in the draft lease,—*quære?* *Ib.*

3. Held, also, that the valuation of the umpire was not invalidated by the circumstance of his having altered it after he had delivered it out, by striking out an item which ought not to have been included therein. *Ib.*

VI. Dilapidations,—See ECCLESIASTICAL VALUATION.

VII. Lease procured by Fraud,—See FRAUD.

LANDS CLAUSES CONSOLIDATION ACT, 1845.

Costs of Proceedings under the 8 & 9 Vict. c. 18, s. 68,—See COSTS, IV.

LEASE.

See FRAUD.

LANDLORD AND TENANT, I, V.

LETTERS-PATENT.

I. Infringement of.

1. The rule for a writ of injunction,—as, to restrain a defendant from in-

fringing a patent,—under the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 82, is a rule to shew cause only, in the first instance. *Gittins v. Symes*, 362.

2. The same relief may be had under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42. *Ib.*

II. *Particulars of Infringements.*

In an action for infringement of Talbot's patent for "improvements in obtaining pictures or representations of objects," the court refused to compel the plaintiff in his particulars of breaches to specify particularly the persons and occasions, or the particular parts of the specification alleged to have been infringed,—although the declaration merely averred an infringement in general terms. *Talbot v. La Roche*, 310.

LIEN.

Application and Extent of.

By agreement between A., a publican, and B., a brewer, it was stipulated that A. should deposit the lease of his house with B., as security for an advance of 150*l.*, for which A. had given B. a promissory note, payable on demand; and B. engaged not to call upon A. to pay the 150*l.*, or any part thereof, for two years, upon condition that the interest thereon should be duly paid half-yearly, that the rent should be paid agreeably to the covenants of the lease, and that A. should take of B. all the beer consumed upon the premises, and pay for it every twenty-eight days. The agreement then provided, that, in case of failure on the part of A. to perform any or either of the above conditions, after fourteen days' notice, B. should be at

liberty immediately to put the note in force, and, if not paid, with interest, to sell the lease; and that all expenses attending such sale, together with the principal and interest due on the note, should be deducted from the amount realized by such sale, *as also any account that might be then due and owing for beer* :—

Held, that,—the power of sale not having been exercised,—on payment, or tender, of the principal and interest due on the note, A. (or his assignee) was entitled to maintain detinue for the lease; and that B. could not set up a lien on it for a balance due on the beer account. *Chilton v. Carrington*, 95.

LIFE-ASSURANCE.

See INSURANCE, 1, 2.

LONDON.

Justices of,—*See* LANDLORD AND TENANT, IV.

LUNATIC.

I. *Service of Process on.*

Where the defendant is a lunatic, the court has no power, under the 15 & 16 Vict. c. 76, s. 17, to allow the plaintiff to proceed as if personal service of the writ of summons had been effected, unless it can be made to appear that the writ has come to the defendant's knowledge, or that he wilfully evades service. *Holmes v. Service*, 293.

II. *Application for Habeas Corpus on behalf of.*

Affidavit.—A rule having been obtained for a habeas corpus to bring up a lunatic confined in an asylum in this country under Irish medical certificates,—the Court discharged it with

costs, there being no affidavit to shew that the party promoting the application was duly authorized by the lunatic. *In re Child*, 238.

MAGISTRATE.

Giving Possession of Deserted Premises,—See LANDLORD AND TENANT, IV.

MEMORANDA.

I. *Patents of Precedence*.

Collier, Robert Porrett, 261.
Phinn, Thomas, 261.

II. *Queen's Counsel*.

Denison, Edmund Beckett, 261.
Erle, Peter, 261.

MERITS.

See ADMIRALTY COURT.

MESNE PROFITS.

See PLEADING, VII, 2.

MINES AND MINERALS.

By an inclosure-act, reciting that the defendant was lord of the manors of A. and B., it was enacted that nothing therein contained should be construed to defeat or prejudice his rights as such lord; but that the lord, his heirs and assigns, should hold and enjoy all manorial rights, and also all mines, minerals, and quarries, &c., belonging to the said manors, in as full and ample a manner as if the act had not been made; "and also full and free liberty at all times hereafter of making, &c., and of granting to any other person or persons, any waggon-ways or other ways in, over, or along the commons or waste land (intended to be allotted and inclosed), and to do every other act now in use, or which shall

hereafter be used or invented, which shall be necessary to be done for the purpose of winning, working leading, and carrying away the said mines, minerals, and quarries within and under the said last-mentioned commons, &c.; and also for the leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever:"—

Held, that the words "produce of any other mines and minerals" did not mean the produce of mines and minerals *other than coals*, but the produce of mines and minerals other than the "mines, minerals, and quarries" before mentioned; and, consequently, that the defendant had a right to use a railway constructed by him under the power so given to him, for the purpose of carrying coke, such coke not being made from coal worked out of the waste which was the subject of the inclosure. *Bowes v. Lord Ravensworth*, 512. [A writ of error is now pending.]

And see PARTNERS.

MONEY PAID.

It is no answer to an action for money paid by the plaintiff for the defendant's use, at his request, that the money was paid in respect of losses on wagering contracts made void by the statute 8 & 9 Vict. c. 109, s. 18. *Knight v. Cambers*, 562.

MUTUAL ASSURANCE.

See INSURANCE, 4, 5.

NEGLIGENCE.

See ADMIRALTY COURT.

NEW MATTER.

See AFFIDAVIT, IV.

NEW TRIAL.

Appeal under the Common Law Procedure Act, 1854.

Semble, that the 34th and 35th sections of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125,—are *not* retrospective, though the 44th section is. *Jenkins v. Betham*, 189.

NOT GUILTY.

"*By Statute*,"—*See* PLEADING, VIII.

NOTARY.

Certificate of.

The court dispensed with the notarial certificate, in the case of an acknowledgment taken at Corfu, under the 3 & 4 W. 4, c. 74,—it being sworn that there was no English notary in the island. *In re Elizabeth Hurst*, 410.

NUDUM PACTUM.

See PLEADING, II.

NUL TIEL RECORD.

Amendment.

Upon a trial by the record, the court amended the declaration by inserting therein *the true amount* recovered by the judgment, under the 15 & 16 Vict. c. 76, s. 122. *Hunter v. Emmanuel*, 290.

OBJECTIONS.

Notice of,—*See* REGISTRATION, 2.

ORDER.

See JUDGE'S ORDER.

OUTLAWRY.

Motion to set aside.

The affidavit upon a motion to set aside proceedings to outlawry for irregularity must shew that the party

making the application is duly authorised as the attorney of the defendant. *Skinner v. Carter*, 472.

OUTSTANDING TERM.

Presumption of Satisfaction of.

In the years 1762 and 1763, two several terms of 1000 years each were created, for mortgage purposes; and, the mortgage debts having been satisfied, these two terms were in 1773 assigned to one Hill, in trust to attend the inheritance, for the benefit of J. C., the elder (the great grandfather of the plaintiff), who was then seised in fee. In 1778, the estate was limited in strict settlement, on the marriage of J. C. the younger (the plaintiff's grandfather); and, in 1813, by a settlement made by the plaintiff's father and grandfather, the estate was limited to the plaintiff's father for life, with remainder to such of his children as he should appoint: but in neither of these settlements was any notice taken of the outstanding terms. In 1840, the plaintiff's father,—assuming and covenanting that he was seised in fee,—sold the estate to one M. D., with whom the defendant was assumed to be identical; and on that occasion the two satisfied terms of 1000 years each were assigned, *by the executors of Hill*, to a trustee for M. D., to attend and protect the inheritance. M. D. had no notice, at the time of the purchase, of the settlement of 1813. In 1844, the plaintiff's father duly executed the power conferred on him by the settlement of 1813, and thereby limited the estate, after his death (which took place in 1853), to his eldest son, the plaintiff, in fee.

In ejectment brought by the plaintiff to recover the premises:—

Held that the mere circumstance of the omission of all mention of the two terms for 1000 years in the conveyances of the estate subsequent to 1813, would not justify the court (even if, on the authority of *Doe v. Hilder*, 2 B. & Ald. 782, it would have warranted a jury) in presuming their surrender; and that, inasmuch as a court of equity would not have restrained the setting up of those terms by M. D. in a court of law, they must be considered as still subsisting, notwithstanding the statute 8 & 9 Vict. c. 112; and consequently the plaintiff was not entitled to recover, because those terms preceded the estate acquired by him under the settlement of 1813, and therefore the title to the legal possession for the remainder of the terms was not in him, but in the assignee thereof. *Cottrell v. Hughes*, 532.

OYER.

See PLEADING, IX.

OYSTER-FISHERY.

Construction of Rules and Orders.

1. The Faversham Oyster-Fishery,—a company in the nature of a prescriptive corporation,—had power by its constitution (confirmed by an act of parliament of 3 Vict. c. lix) at certain courts called water-courts to make orders, rules, and regulations for the government and management of the company, and for imposing and levying fines and penalties on its members for the breach or non-observance of such orders, rules, and regulations; and also to appoint a foreman and a jury of twelve who should have the management and regulation of the fishery, and of the affairs of the company.

By a water-court order of the 31st of July, 1790, it was ordered, amongst other things, "that all such tenants [freemen or members of the company] as have boats shall work for the company in regular turn, *unless that he or his boat should be incapable of doing business*, that is to say, each man, being so capable, shall succeed him who worked last, as he stands in the company's list." And by a subsequent order of the 29th of July, 1797, reciting the order of the 31st of July, 1790, it was "declared, ordered, and decreed that nothing in the said recited orders, or either of them, contained, was meant or intended to deprive or hinder, or shall deprive or hinder, the foreman and jury of this company, or the major part of them assembled on the company's affairs, from exercising at all times their ancient and accustomed discretionary powers of regulating the business of the said company, by postponing or setting aside the turn of any of the tenants of this manor and hundred, in doing any business of the said company, for reasons appearing to the said foreman and jury, or the major part of them, to be satisfactory, expedient, or proper, for that purpose."

On the 12th of July, 1852, an order to the following effect was made *by the foreman and jury*.—"As the commencement of the season for the selling of oysters is drawing near, in order to provide salesmen, it is ordered that the foreman put out a notice for persons, freemen of the company, who are desirous of going to London as *salesmen*, to give in their names to him or any one of the jury *on or before the 19th instant*; and that the jury proceed to the electing of such on or as

soon after that time as convenient. And, in order that the company may be provided with fitting and proper vessels to take the oysters to market, it is ordered that notice be posted at the usual place, to require those freemen that have boats fitting and proper, to give notice to the foreman or any one of the jury of their intention of working for the company."

There was no evidence of the giving of such notice by the foreman under the above order; but the plaintiff had notice of it on the 14th of July.

On the 19th, a further order was made by the foreman and jury, as follows:—"It is ordered that three men (naming them) go to Billingsgate, as salesmen. The following are the names of those that have given notice, according to the notice of the 13th of July, of their intention of carrying oysters for the company (naming the men and their boats): and it is ordered that the above-named boats do carry the oysters to Billingsgate Market, and that no boats be allowed to take a turn with them until the 31st of October."

The plaintiff not having given notice of his intention to carry until the 18th of August, the defendant,—acting under the order of the 19th of July,—refused to employ him and his boat until after the 31st of October.

Before the year 1850, the practice had been, that the foreman and jury ascertained, either by notice or by personal application, before the commencement of each season, who could carry, and then the freemen, after they had ceased to be employed elsewhere, gave notice, and came in after standing by one turn. The plaintiff himself had, however, been excluded in the

year 1851, by reason of his omission to give notice of his readiness.

In an action against the foreman for excluding the plaintiff and his boat from turns of carrying, under the above circumstances:—

Held, that the order of the 31st of July, 1790, was properly alleged in the declaration as giving the freemen having boats an absolute right to work in turn, and that the incapacity of the man or his boat, not being in the nature of a qualification or limitation of the right, need not be noticed. *Hills v. Hunt*, 1.

2. The defendant justified under the orders of the 12th and 19th of July, 1852, stating, that, by the former, those freemen who intended to work for the company were thereby required to give notice of such their intention *on or before the 19th of July*; that the plaintiff omitted to give such notice; that, by the order of the 19th, notice was given that such only of the freemen as had given notice should be employed in carrying oysters for the company, and that those who had not given notice should be excluded until after the 31st of October; and that, by reason of the last-mentioned order or regulation, the defendant, as foreman, refused to employ the plaintiff, as he lawfully might, &c.:—Held, that the plea was not sustained by the production and proof of the order above set forth; and that the plea could not be made good by striking out the order of the 12th of July. *Id.*

3. *Quære*, whether the foreman and jury had power to make the order of the 19th of July, 1852, and whether, if they had, it was a reasonable one,—the notice of the 12th giving no intimation of the time at which the freemen were

required to give notice of their intention to carry, nor informing them of the consequences of their omission to do so? *Ib.*

PARTNERS.

What constitutes a Partnership.

The defendant and others met for the purpose of forming a company for working a mine on the cost-book principle, the concern to consist of 60,000 shares, of which 15,000 were to be appropriated to the owner of the mine, 33,750 to A., B., and C., and the remainder allotted to other parties in proportion to certain capital subscribed by them,—1125 being allotted to the defendant, for which he paid 100*l.*: and it was at that meeting resolved, amongst other things, *that the requisite capital to work the mine for the first six months should be found by A., B., and C.* The same resolution also stated that the mine had been purchased of the owner for the sum of 1000*l.* in cash, and 15,000*l.* to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations,—such payment of 15,000*l.*, or surrender of the mine to the owner, being optional by the said adventurers:—Held, that, by this arrangement, each adventurer became a partner in the concern *from the commencement*, and liable as such for goods supplied for the working of the mine. *Peel v. Thomas*, 714.

PATENT.

See LETTERS-PATENT.

PATENT OF PRECEDENCE.

See PROMOTIONS, I.

PAYMENT.

Of Money into Court.

The plaintiff brought an action for 12*l.* 5*s.* 7½*d.*, for goods sold and delivered. The defendant paid 10*l.* on account, and before declaration took out a summons calling on the plaintiff to shew cause why the proceedings should not be stayed on payment of the further sum of 6*s.* 4½*d.* and costs. The plaintiff claiming more, no order was made. A declaration was afterwards delivered, and the defendant paid 7*s.* into court, which the plaintiff accepted:—Held,—dissentiente *Cresswell, J.*,—that the plaintiff's acceptance of 7*s.*, after his refusal of 6*s.* 4½*d.* did not disentitle him to the costs incurred subsequently to the offer. *Shaw v. Hughes*, 660.

II. *Of a lesser in Satisfaction of a larger Sum*,—See PLEADING, III, 2, 3.

PERFORMANCE.

See PLEADING, IV.

PLEADING.

I. *Declaration in Case for False Representation*,—See CASE, I, 1.

II. *Statement of Consideration.*

The plaintiff declared, in the first count, in debt for railway shares; in the third, in trover for certificates for shares; in the fourth, in detinue for the certificates for shares mentioned in the third count.

The fifth count stated, that, at the time of the writing the letter and making the contract therein and in that count mentioned, the claims of the plaintiff in the first, third, and fourth counts had severally arisen and accrued in manner and form as therein ex-

pressed, and the defendant ought to have paid or satisfied the plaintiff for and in respect of those several claims; that the defendant had from time to time requested the plaintiff to give him time, and to forbear and grant to him indulgence for the payment or satisfaction of the said claims, which the plaintiff had done; and that the defendant, being insolvent and unable to pay or satisfy those claims, and to obtain further time, wrote to the plaintiff, as follows,—“That I have wronged you in not having (because incapable) repaid or returned that which you lent me (thereby meaning and referring, amongst other loans, to the said loan of the said certificates in the first count mentioned), it were useless for me to deny: but, how I have wronged you in feeling, seeing that I have ever, as I do now, entertained for you the sincerest gratitude and regard, I know not, beset as I am in difficulties on every side, not resulting from extravagance, but from bad fortune. I know how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence (thereby meaning that the defendant did then entreat and ask for indulgence from the plaintiff for the payment or satisfaction of the claims of the plaintiff). Yet will I say that the most anxious endeavour and hope of every future day shall be, to prove my regard and gratitude in the only way in which the world esteems the proof, by restoring to you all that I owe (thereby meaning, amongst other things, the payment or satisfaction of the said claims of the plaintiff).” The count concluded with an averment, that, in pursuance of that letter, and on the faith of the promise of the defendant therein contained, the

plaintiff, at the request of the defendant, did continue to give him time, and to forbear and grant him indulgence and further time for the payment or satisfaction of the said claims; but that, although a reasonable time had elapsed for the performance by the defendant of his said contract in the said letter contained, yet the defendant had not restored to the plaintiff all he owed, but had neglected and refused so to do, &c. :—

Held, on demurrer to the fifth count, that the letter shewed no request for forbearance, nor any consideration for a fresh promise by the defendant to pay what he already was liable to pay; and that, if it did amount to a fresh promise to pay, it was a promise without consideration. *Deacon v. Gridley*, 295.

III. *Accord and Satisfaction.*

1. To a declaration upon a contract for the delivery of 600 loads of timber at Dantzic, the defendant pleaded, that, after the accruing of the causes of action, and before suit, it was agreed between the plaintiffs and the defendant, that the defendant should deliver to the plaintiffs in London certain other timber, and that such other timber should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes of action upon the contract in the declaration mentioned; that the defendant, in part performance of such agreement, delivered to the plaintiffs, and they accepted and received of him, 143 loads, on the terms aforesaid, in full satisfaction and discharge of the causes of action in the declaration mentioned, so far as they related to 143 loads of timber in the contract mentioned; and that

the defendant, within a reasonable time, *tendered* the plaintiffs the residue of the timber to complete the contract:—

Held, on demurrer, that the plea was neither good as a plea of accord and satisfaction, for want of an averment of satisfaction; nor as a plea of performance, there being no averment, express or implied, that the substituted agreement was accepted in satisfaction. *Gabriel v. Dresser*, 622.

2. Payment of a smaller sum, with an agreement to abandon a defence and pay costs, may be pleaded in satisfaction of a larger demand, whether liquidated or unliquidated. *Cooper v. Parker* (in error), 822.

3. To debt for work and labour, money lent, &c., the defendant pleaded, that, after the accruing and during the subsistence of the causes of action, and before suit, the plaintiff levied a plaint in a certain county-court to recover 50*l.* claimed to be due to him from the defendant for money lent, &c.; that the defendant defended himself against the said plaint, and, being an infant at the time of the accruing of the causes of action for which the plaint was levied, gave notice of a defence on that ground; that, before trial, and before the commencement of this suit, it was agreed between the plaintiff and defendant that the defendant should pay the plaintiff 30*l.*, and the costs of the plaint, and that the plaintiff should accept the said sum of 30*l.*, and the performance by the defendant of the agreement in this plea mentioned, respectively, in full satisfaction and discharge of the causes of action, &c.; and that the 30*l.* was paid to and received by the plaintiff, and the costs of the plaint paid by the defendant, &c.:—Held,—by the Exchequer Cham-

ber, affirming the judgment of the court of Common Pleas,—that, assuming the claim in the county-court to have been for a liquidated demand, the plea was a good plea of satisfaction. *Ib.*

IV. *General Averment of Performance.*

The rules of a society established for the mutual assurance of traders against bad debts, after stipulating for the payment of premiums, provided, amongst other things, that, "if the premiums on any policy should not be paid within fifteen days after the same should fall due, the directors might, with the approbation of the council, either declare such policy void, or enforce the payment of such premiums." In an action on a policy, the plaintiffs averred that they had done all things necessary on their part, and had been ready and willing to do all things according to the said policy, rules, and regulations, which it was necessary that they should be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle them to be paid by the society the loss thereafter mentioned, and that a reasonable time for payment thereof had elapsed. It then went on to aver that a loss had been incurred, and that the defendants refused to pay:—Held, that this general averment was sufficient, without shewing the various steps required by the rules of the society to entitle the assured to recover a loss. *Bamberger v. The Commercial Credit Mutual Assurance Society*, 676.

V. *Plea of Fraud.*

To a count upon an agreement whereby the defendant agreed upon certain terms to sell to the plaintiff

"all his unexpired term and leasehold interest in a farm then in his occupation," with immediate possession,—the defendant pleaded, that he held a farm under a lease containing a covenant not to assign without the consent in writing of the lessors; that, being desirous to part with the farm, he applied to the agent of the lessors for their consent to his doing so, and had obtained an assurance, that, if he found an eligible tenant, who could give satisfactory references, the consent would not be withheld; that the agreement was made for the purpose of one Main becoming the occupier of the farm; and that the defendant was induced by the plaintiff to enter into the agreement, and did so, upon the faith and assurance, as the plaintiff knew, and the plaintiff, in order to induce the defendant to enter into the agreement, represented, and induced the defendant to believe, that Main was a person of respectability, and eligible as tenant of the farm, and could give references that would be satisfactory to the landlords; whereas, in truth, he was not a person of respectability, and could and did not give such references:—Held, a good plea, inasmuch as it shewed that the defendant was induced to enter into the contract by a false representation of the plaintiff as to a fact within his knowledge, and which was material to the subject-matter of the contract. *Canham v. Barry*, 597.

VI. *Plea in Avoidance of Circuity of Action.*

1. To constitute a good plea in avoidance of circuity of action, it must shew that the sum which the defendant is entitled to recover from the

plaintiff is necessarily the same as that in respect of which the plaintiff is suing. *Charles v. Altin*, 46.

2. By a charterparty it was agreed between the master and the charterers that one third of the stipulated freight should be paid before the sailing of the vessel,—*the same to be returned, if the cargo was not delivered at the port of destination,—the charterers to insure the amount at the owner's expense, and deduct the cost of doing so from the first payment of freight.* The charterers paid the one third freight, deducting the premium of insurance. The vessel and cargo did not reach their port of destination. In an action by the charterers to recover back the freight so paid,—the owner pleaded that the loss of the part of the freight to be returned, was such a loss as was by the charterparty to be insured against by the charterers at the owner's expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that, although the plaintiffs might with the use of reasonable care and diligence have effected an insurance whereby the defendant and the owner of the ship would have been fully indemnified against the loss of the one third freight so to be returned, the plaintiffs effected the insurance so negligently and out of the usual course of business, that the same became of no use or value, and the defendant by reason of such improper conduct had sustained damages to the amount of the said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to the defendant such amount as he should have to return to the plaintiffs under their charterparty,

and any sum paid or returned by the defendant to the plaintiffs in respect of the freight would be the damages sustained by the defendant by reason of such improper conduct and deviation, and the defendant would be damnified to that extent:—

Held (dubitante *Crowder, J.*), that the plea was bad, inasmuch as the conclusion it drew was not warranted by the facts stated, for, that the liability of the plaintiffs in respect of their negligence in effecting the insurance, was a liability to *damages*, which were not necessarily identical in amount with the claim set up by them in this action. *Id.*

VII. *Plea by Way of Estoppel.*

1. To a count for money had and received, the defendant pleaded, that the "said debt for money received became due from, and was contracted by, the defendant jointly with A., and not by the defendant alone, nor by the two jointly and severally, but only jointly;" that, after the accruing of the causes of action in the count mentioned, the plaintiff sued A. for money had and received, and in trover, and recovered a judgment against him for 100*l.* and costs; and that the causes of action in respect of which the plaintiff so recovered that judgment against A. *included all the causes of action to which that plea was pleaded.*

It appeared in evidence, that the defendant and A. had wrongfully converted the goods of the plaintiff, by selling them; that the proceeds of the sale (150*l.*) were received *by the defendant alone*; and that the plaintiff had sued A., and recovered a verdict for 100*l.*, as the value of the goods so converted; but that, in consequence of A.'s insol-

veny, he had obtained no satisfaction.

Upon its being objected, at the trial of the action, that these facts did not sustain the plea, the judge allowed the defendant to amend by substituting for the words above in inverted commas, the following, "the said money was money received for and as being the proceeds of the sale of the goods in the last count and hereinafter mentioned:"—

Held,—that the amendment was properly allowed, though the judge imposed no terms on the defendant,—and that the amended plea afforded a complete answer to the claim of the plaintiff in this action. *Buckland v. Johnson*, 145.

2. In trespass for meane profits, the defendant pleaded,—first, not possessed,—secondly, that, before the several times when &c., A. was seised in fee, and, on the 27th of December, 1846, demised the premises to B. for twenty-one years; that B. entered by virtue of that demise, and, on the 28th of January, 1847, demised to the defendant for one year from the 25th of March then next, and so from year to year, &c., and that the defendant entered by virtue of the last-mentioned demise.

Replication (by way of estoppel), as to so much of the pleas as related to the trespasses complained of in the count since the 26th of October, 1853,—that the plaintiff on that day sued out a writ of ejectment for the recovery of the premises in question (setting out the writ); that Emily Kirby in the same writ mentioned was the defendant in this action, and was at the time of the issuing of the said writ the tenant in possession of the premises in question; that the premises in the said

writ and in this action were the same, and that the plaintiff in the said writ named was the now plaintiff; that no appearance was entered or defence made to the said writ; that, after the issuing of the said writ, and whilst the ejectment was pending, and in pursuance of the act of parliament in that behalf, the plaintiff, by the consideration and judgment of the court, obtained possession of the said premises, &c.; that the said judgment was still in force; and that, afterwards, and before the commencement of this suit, and by virtue of the said judgment, the plaintiff entered into and upon the possession of the premises,—wherefore the plaintiff prayed judgment if the defendant ought to be admitted, against the said recovery, record, and proceedings, to plead the said pleas, or either of them, as to the trespasses in the count complained of since the said 26th of October, 1853 :—

Held, on demurrer, a good replication by way of estoppel to both pleas; that it was not necessary to aver notice to the defendant of the proceedings in the ejectment, or the issuing or execution of a writ of possession. *Wilkinson v. Kirby*, 430.

3. Held, also, that, if it were necessary, the replication contained a sufficient averment of entry by the plaintiff. *Ib.*

4. Held, also, that the plaintiff's title by estoppel related back to the date of the writ of ejectment, and would be presumed to continue until shewn by rejoinder to have been determined. *Ib.*

5. To an action for an injury to the plaintiffs' vessel by a collision in the river Thames, the defendants pleaded, that the merits in respect of the demand by this action sought to be en-

forced, had been already tried and determined, and certain proceedings, to which the plaintiffs and the defendants were parties, had been had in the Admiralty Court, and that the merits upon which the plaintiffs sought to recover in this action were thereby and then tried, and, after *due proceedings had* and taken in the said court, and *in due form of law*, determined by that court in favour of the defendants; and that it was then held and adjudged by the said court that the collision occurred through the negligence of the plaintiffs, and not through the negligence of the defendants :—

Held, that the plea was no answer to the action, inasmuch as it did not shew upon the face of it that the Admiralty Court had jurisdiction over the matter in question. *Harris v. Willis*, 710.

VIII. *Not guilty "by statute."*

Upon a plea of not guilty "by statute," where the defence arises upon several statutes, one or more of which are omitted from their margin, their insertion is an amendment which may be allowed, upon terms, within the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 222, at any time. *Edwards v. Hodges*, 477.

IX. *Informal Demurrer.*

In an action upon an award, the declaration alleged that certain differences between the plaintiff and defendant had been referred, and that the arbitrator had awarded that certain sums should be paid at certain times by the defendant to the plaintiff, and assigned for breach the non-payment of an instalment. The defendant pleaded, setting out the award verbatim, and concluding in the form of a demurrer,

"that the said declaration is not sufficient in law;" and the plaintiff joined in demurrer:—

Held, that the demurrer was informal,—the instrument set out (since the Common Law Procedure Act, 1852,) forming part of the *plea*,—and consequently there being nothing to shew the declaration bad. *Sim v. Edmonds*, 240.

POLICE MAGISTRATE.

Giving Possession of Deserted Premises,—See LANDLORD AND TENANT, IV.

POWER OF SALE.

See LIEN.

PRACTICE.

I. Process.

1. *Service of Writ of Ejectment*.]—*Quære*, whether the affidavit (required by the 112th rule of Hilary Term, 1853,) of service of the writ of ejectment under the 170th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, should shew (as under the old practice) that the nature and object of the service were *explained* to the party served. *Edwards v. Griffith*, 397.

2. At all events an irregularity in that respect is waived by a subsequent attornment. *Ib.*

3. *Service on a Lunatic*.]—Where the defendant is a lunatic, the court has no power, under the 15 & 16 Vict. c. 76, s. 17, to allow the plaintiff to proceed as if personal service of the writ of summons had been effected, unless it can be made to appear that the writ has come to the defendant's *knowledge*, or that he *wilfully* evades service. *Holmes v. Service*, 293.

4. *Renewal of Writs*.]—By the 11th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, the original writ of summons is described to be in force only "for six months from the day of the date thereof, *including the day of such date*"; but it is enacted, that, if any defendant therein named may not have been served therewith, the writ may be renewed, "at any time *before its expiration, for six months from the date of such renewal*, and so from time to time *during the currency of the renewed writ*," by being sealed with a seal to be provided for that purpose.

Quære, whether the six months for which the renewed writ under this section is to be available, are to be reckoned inclusively or exclusively of the date of the renewal? *Black v. Green*, 262.

5. The officer, assuming the former to be the proper construction of the statute, having declined to seal a writ which upon that assumption was tendered a day too late,—the Court, without expressing any opinion as to whether or not he had rightly construed the act, directed him to seal the writ *nunc pro tunc*. *Ib.*

II. Appeal under the Common Law Procedure Act, 1854.

Semble, that the 34th and 35th sections of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125,—are *not* retrospective, though the 44th section is. *Jenkins v. Betham*, 189.

III. Rule to discontinue.

1. In an action by assignees of a bankrupt, the defendant gave notice to dispute *the trading and act of bankruptcy*. At the trial, the judge non-

sued the plaintiffs on the ground that the petitioning-creditor's debt upon the proceedings was contracted at a period when the bankrupt had ceased to be a trader. The court set aside the nonsuit, holding that the objection was not open to the defendant under the notice to dispute *the trading and act of bankruptcy*. A judge at Chambers having allowed the defendant to amend his notice, by adding thereto that he intended at the trial to dispute the petitioning-creditor's debt,—The court refused to allow the plaintiffs to discontinue *without payment of costs*. *Hernamann v. Barber*, 774.

2. Where an administratrix has been made defendant in an action commenced against the intestate, by a suggestion under the 138th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, and has pleaded to the suggestion, —the court will not allow the plaintiff to discontinue without payment of *all the costs of the cause*. *Benge v. Swaine*, 784.

3. The plaintiff having obtained a judge's order to discontinue "on payment of costs," and having acted upon the order, by attending the taxation under it,—the court refused to allow him to abandon it. *Ib.*

IV. *Security for Costs.*

Where a plaintiff is insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs. *Goatley v. Emmott*, 291.

V. *Setting aside Proceedings for Irregularity.*

The affidavit upon a motion to set aside proceedings to outlawry for irre-

gularity must shew that the party making the application is duly authorised as the attorney of the defendant. *Skinner v. Carter*, 472.

VI. *Entering Verdict.*

Upon a negotiation for the sale of a ship, B., the seller, represented to A., the buyer, that she was, so far as he knew, as sound as a ship of her age usually was. Upon the faith of this representation, A. agreed to purchase the ship, and proceeded to make alterations in her to fit her for a voyage to Australia, for which B. at the time of the contract knew she was intended. The register proving defective, A. afterwards repudiated the bargain, and, upon a suggestion that the representation of B. as to the ship's soundness was false, brought an action against him, charging him with a false and fraudulent representation with a view to induce A., and whereby A. was induced, to expend money on the ship, which but for such false and fraudulent representation he would not have done.

At the trial, the judge told the jury, that, to sustain the action, the plaintiff must prove,—that the defendant made the representation alleged,—that it was false,—that the defendant knew it to be false,—and that damage had resulted to the plaintiff. The jury returned the following verdict,—“We find for the plaintiff, but acquit the defendant of any fraudulent intention:”—Held, that, upon this finding, the verdict was properly entered for the plaintiff. *Milne v. Marwood*, 778.

PRECEDENCE, PATENT OF.
See PROMOTIONS, I.

PRESCRIPTIVE CORPORATION.*See* OYSTER-FISHERY.**PRISONER.***Discharge of, under 7 & 8 Vict. c. 96, s. 25.*

By the 7 & 8 Vict. c. 96, s. 25, sums payable by way of annuity are to be deemed *debts*: and by s. 57,—reciting “that it is expedient to limit the present power of arrest upon final process,” it is enacted, “that no person shall be taken or charged in execution upon any judgment obtained in any action for the recovery of any debt, wherein the *sum recovered* shall not exceed 20*l.*, exclusive of the costs recovered by such judgment.”

A. signed judgment for 500*l.* on a warrant of attorney given by B. to secure an annuity of 32*l.* by half-yearly payments, and took B. in execution for 16*l.*:—Held,—*dubitante Williams, J.*,—that B. was entitled to be discharged from custody under the above act, the “sum recovered” by the action being 16*l.* *Johnson v. Harris*, 357.

PRIVATE ACT.*Construction of,—See* INCLOSURE ACT.**PROCESS.***See* PRACTICE, I.**PROHIBITION.***Where granted.*

1. To entitle a party to a prohibition to restrain commissioners under a local improvement act from proceeding to enforce a penalty for an offence against the act, he must distinctly shew that they are acting without jurisdiction: it is not enough to shew that it is doubtful, upon the act of parlia-

ment, whether their jurisdiction extends to the place where the alleged offence was committed. *In re Birch*, 743.

2. “Public place,” meaning of. *Ib.*

PROMOTIONS.**I. Patents of Precedence.**

Collier, Robert Porrett, 261.

Phinn, Thomas, 261.

II. Queen's Counsel.

Denison, Edmund Beckett, 261.

Erle, Peter, 261.

PROVISIONAL REGISTRATION.*See* JOINT-STOCK COMPANY, 1, 2.**PUBLIC PLACE.***See* PROHIBITION.**PUBLIC STOCK.***See* STOCK-JOBING.**QUARE IMPEDIT.**

The Marquis of Bristol v. Robinson, 244.

QUEEN'S COUNSEL.*See* PROMOTIONS, II.**RAILWAY COMPANY.**

Costs of Proceedings against the Company for Damage to Land, under the 8 & 9 Vict. c. 18, s. 68,—See COSTS, IV.

RAILWAY TRAFFIC.*See* REGULE GENERALES, 473—476.**READINESS AND WILLINGNESS.***See* PLEADING, IV.

REGISTRATION.

See JOINT-STOCK COMPANY, 1, 2.

REGISTRATION OF VOTERS.

Under 6 & 7 Vict. c. 18.

1. *Yearly Value.*—The criterion of value under the statute 8 H. 6, c. 7, is, not what the land actually produces, but what in its existing state it reasonably may produce. *Astbury, App., Henderson, Resp., 251.*

A. bought a piece of freehold land for 150*l.*, intending it for building purposes, for which it was suitable. In a case stated by a revising-barrister, it was found, that, if let upon a building-lease, the land would be worth a ground-rent of 15*l.* a year; and that A. had received a bonâ fide offer of that sum, but had refused it as insufficient:—Held, that, although the land was unbuilt upon and unlet, and consequently remained unproductive, A. was nevertheless entitled to be registered as the owner of a freehold estate of the clear yearly value of 40*s.* *Ib.*

2. *Notice of Objection.*—A notice of objection given to overseers, pursuant to the 6 & 7 Vict. c. 18, s. 13, and Sched. (B.) No. 3, described the party objected to as being "in the list of persons entitled under the reform act, to vote," &c.:—Held, a sufficient specification of the particular list referred to. *Huggett, App., Lewis, Resp., 245.*

REGULÆ GENERALES.

General Rules as to Forms of Proceedings and Process, made pursuant to the statute 17 & 18 Vict. c. 31, s. 4, intituled "An Act for the better Regulation of the Traffic on Railways and Canals." 473—476.

REVOCATION.

See EXECUTORS AND ADMINISTRATORS.

SALE.

I. *Delivery of Goods.*

A., carrying on business in Manchester, by his traveller sold goods to B. at Oxford, which goods were to be forwarded in the usual way, viz. by the London and North-Western Railway. The goods were accordingly packed and sent by A. to the railway-station at Manchester, addressed to B. at Oxford:—Held, that, as the order for the goods was received at Oxford, the "whole cause of action" did not arise in Manchester, so as to give the county-court there jurisdiction to try it, under the 9 & 10 Vict. c. 95, s. 60. *Borthwick, App., Walton, Resp., 501.*

II. *Warranty on Sale of Goods.*

In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent at the time of the sale represented the goods to be of a particular quality. *Harnor v. Groves, 667.*

III. *Confirmation of,*—See EXECUTORS AND ADMINISTRATORS.

IV. *Power of,*—See LIEN.

And see CONTRACT.
WARRANTY.

SATISFACTION.

See ACCORD AND SATISFACTION.

SECURITY FOR COSTS.

Debt assigned and Plaintiff insolvent.

Where a plaintiff is insolvent, and has assigned the debt for which the ac-

tion is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs. *Goatley v. Emmott*, 291.

SEDUCTION.

Loss of Service.

A. agreed with B. to permit his (B.'s) daughter (who was then residing with him as part of his family) to enter his (A.'s) service, to assist in his business during a temporary absence of his wife.—Held, that B. might maintain an action for her seduction by A. during that period. *Griffiths v. Tooten*, 344.

SEWERS-RATE.

Right of Tenant to deduct.

A. demised land to B. upon a building lease, at the yearly rent of £100, clear of all rates, assessments, &c., the sewers-rate, land-tax, and landlord's property or income-tax only excepted, with the usual covenants for the payment of rent, &c. B. having by building on the land increased its rateable value to £200 per annum.—Held, that he was only entitled to deduct the sewers-rate and land-tax upon the original rent, and not in respect of the improved value. *Smith v. Esdaile*, 327.

SHIP AND SHIPPING.

1. Liability of Insurer if Ship of Loading, for Cargo.

The acceptance of a cargo by the mate of the ship, or loading whereby the goods were deliverable to order, "against payment of the agreed freight and other conditions as per charter-party," is a circumstance from which the jury may imply a contract on the part of the insurer to indemnify the cargo for the cargo-party, notwithstanding

ing his refusal at the time of receiving the goods to pay the demurrage. *Wegener v. Smith*, 255.

II. Construction of Charter-party.—See CHARTER-PARTY.

And see DAMAGES.

SLANDER.

See DEFAMATION.

SPECIAL CASE.

Amendment of.

The court will not allow a special case to be amended, by adding a point which the parties have not raised for their consideration. *Ellis v. Frost*, 1.

SPECIAL DAMAGE.

See CASE I. 2.

STATUTE OF FRANCHISE.

Interest in Land.

In consideration that A. who was in the possession and enjoyment of premises wherein he carried on the business of a miller, would grant to the plaintiff and his heirs the said premises to A. and his heirs and assigns forever, and would assign over to A. all his property in the said mill and mill, and deliver the same to A. the latter intended to pay A. a certain sum.—Held, that this was a contract for an interest in the said premises within the 24th section of the 2d Geo. 2. c. 25. *Smith v. Esdaile*, 327.

STOCK-JURINGS.

Differences.

It is an action for a stock, shares, scrip, bonds, and choses in action, and such and such delivered by the plaintiff to the defendant, and for work

and labour and materials and for commission due and payable in respect thereof, and for money paid by the plaintiff for the defendant at his request, and for money due on accounts stated,"—the defendant pleaded,—as to so much of the claim as related to money payable by the defendant to the plaintiff for the said work and materials and commission, and for money paid by the plaintiff, and for money due from the defendant upon the said accounts stated,—that the plaintiff was a stock and share broker, and that the defendant employed him as such broker, after the passing and coming into operation of the said act of parliament (referring to the 8 & 9 Vict. c. 109, mentioned in a former plea), to enter into, and the plaintiff accordingly entered into, on his behalf, certain contracts by way of gaming and wagering, "contrary to the form of the statute," that is to say, certain wagering contracts, under the semblance of pretended sales, respecting the market price and value of certain *public and other stock, shares, scrip, and goods, and chattels*, on certain days then to come, whereby, under pretence of contracts, the plaintiff agreed with divers persons whose names were to the defendant unknown, that, if the price and value of the said public stock and shares, scrip, goods, and chattels, should be lower, &c., and vice versâ, "differences" should be paid. The plea then went on to allege, that no real sale was intended, and that the plaintiff knew it; and that the work and labour in the declaration mentioned was done, and the commission claimed, in respect of the making of the said wagers and contracts in the plea mentioned; and that the money paid by the

plaintiff was paid by him as such broker in settling such differences:—

Held, that the plea was no answer to the action. *Knight v. Fitch*, 566.

2. *Semble*, that it was substantially a plea founded on the 8 & 9 Vict. c. 109, s. 18: but that, if it was to be treated as a plea founded on the stock-jobbing act, 7 G. 2, c. 8, it should have shewn that each of the contracts mentioned therein involved a dealing in *public stock*. *Id.*

SURRENDER.

Presumption of,—See OUTSTANDING TERM.

SURVEYOR.

See ECCLESIASTICAL VALUATION.

TENDER.

See PLEADING, III.

TERM.

See OUTSTANDING TERM.

TRESPASS.

For Mesne Profits,—See PLEADING, VII, 2.

TROVER.

Judgment in.

Semble,—per Jervis, C. J.,—that a judgment in trover vests the property in the goods in the defendant, *from the time of the conversion*. *Buckland v. Johnson*, 145.

UNSATISFIED TERM.

See OUTSTANDING TERM.

USE AND OCCUPATION.

Compensation for.

A. entered into an agreement (in writing) with B. to take certain premises, at a certain yearly rent,—the premises to be put into repair by B., and the rent not to be payable until the repairs were completed. A., by his tenant, occupied the premises for six months, and then quitted, the stipulated repairs not having been done:—Held, that B. was entitled to maintain an action for use and occupation, as upon an implied agreement to pay so much as the occupation might be reasonably worth. *Smith v. Eldridge*, 236.

VALUATION.

See ECCLESIASTICAL VALUATION.

VENIRE DE NOVO.

See WRIT OF ERROR.

VERDICT.

Entering,—See PRACTICE, VI.

VESTRY MEETING.

Notice of.

A rate may be made, under the provisions of the 58 G. 3, c. 45, ss. 59, 60, for the purpose of paying the principal and interest of money borrowed in the manner provided by that act, at a meeting of which the notice required by the 25th section of the 59 G. 3, c. 134, has not been given,—the latter statute not repealing the former, but merely providing a further mode of raising the necessary funds. *Farnell v. Smith*, 572.

WAGERING CONTRACT.

See GAMING.

WAIVER.

See PRACTICE, I, 2.

WARRANT OF ATTORNEY.

To secure Instalments of an Annuity.

By the 7 & 8 Vict. c. 96, s. 25, sums payable by way of annuity are to be deemed debts: and by s. 57,—reciting “that it is expedient to limit the present power of arrest upon final process,” it is enacted “that no person shall be taken or charged in execution upon any judgment obtained in any action for the recovery of any debt, wherein the sum recovered shall not exceed 20*l.*, exclusive of the costs recovered by such judgment.”

A. signed judgment for 500*l.* on a warrant of attorney given by B. to secure an annuity of 32*l.* by half-yearly payments, and took B. in execution for one instalment of 16*l.*:—Held,—dubitante *Williams, J.*,—that B. was entitled to be discharged from custody under the above act, the “sum recovered” by the action being 16*l.* *Johnson v. Harris*, 357.

WARRANTY.

I. *On Sale of a Horse.*

1. A. sent his horse to Tattersall's for sale by public auction, where he was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable, and seeing him in the act of examining the horse's legs, A. said,—“You have nothing to look for: I assure you he is perfectly sound in every respect;” whereupon, B. replied, “If you say so, I am perfectly satisfied,” and, upon the faith of the representation so made to him by A.,

—which was admitted to have been made in perfect good faith,—became the purchaser:—Held, that there was no evidence of *warranty* to go to a jury,—the representation made by A. on the day preceding the auction forming no part of the contract of sale. *Hopkins v. Tanqueray*, 130.

2. *Quære*, per *Maule, J.*, as to the legality of such a secret bargain for a warranty, where third persons attending the sale are bidding upon the supposition that the sale is without warranty. *Ib.*

II. On Sale of Goods.

In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent at the time of the sale represented the goods to be of a particular quality. *Harnor v. Groves*, 667.

WILL.

See DEVISE.

WINDING-UP ACTS.

Construction of.

The 66th section of the 7 & 8 Vict. c. 110, enables a creditor to enforce a judgment obtained against a joint-stock company *completely registered*, by execution against shareholders.

The 50th section of the winding-up act, 11 & 12 Vict. c. 45, provides, that, after the appointment of an official manager under that act, all actions brought against *the company or any person duly authorised to be sued as nominal plaintiff on behalf of the company*, shall be brought against the official manager.

And the 12 & 13 Vict. c. 108, s. 1,

extends the provisions of the last-mentioned act to all partnerships consisting of more than seven members:—

Held, that a judgment obtained against the official manager can only be enforced against a shareholder, where the action is one which *could* be brought against the company as a company, or against some person authorised to be sued on their behalf; and, consequently, that the provisions of the winding-up acts do not apply to the case of an action against a non-registered company. *Pritchard v. The London and Birmingham Extension, Northampton, Daventry, Leamington, and Warwick Railway Company*,—*In re Weiss*, 331.

WRIT OF EJECTMENT.

See EJECTMENT, I.

WRIT OF ERROR.

Upon the argument of a writ of error on the ground that a plea which has been found for the defendant is bad in law, it is no ground for a *venire de novo*, that the finding upon that plea is inconsistent with the finding on another issue. *Cooper v. Parker* (in error), 822.

WRIT OF SUMMONS.

Sealing writs "*nunc pro tunc*,"—See PRACTICE, I, 4, 5.

YEAR'S RENT.

See LANDLORD AND TENANT, III.

YEARLY VALUE.

See REGISTRATION OF VOTERS, I.

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